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In the
Supreme Court of the United States

JOSE ANTONIO RODRIGUEZ,
Petitioner,

v.

FEDEX FREIGHT EAST, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioner's right to a fair trial by impartial jurors was impaired by the district court's refusal to give a jointly requested instruction that specifically prohibited the jurors from using the Internet for any purposes regarding the case, where the district court did not give the parties an opportunity to object, and where the district court knew that case-related information was accessible to the jurors on the Internet, including the prior district court's decision dismissing petitioner's case and the Sixth Circuit's decision affirming the dismissal of claims, save, the failure to promote claim?

Whether petitioner was denied due process by the district court's refusal to conduct an evidentiary hearing to (1) determine whether the integrity of the verdict was tainted by a juror who obtained case-related information on the Internet and (2) allow petitioner an opportunity to demonstrate that he was denied a fair trial by impartial jury?

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HISTORY; (6) OBTAIN YOUTUBE VIDEOS, PHOTOGRAHS, VIDEO DISCOVERY DEPOSITIONS, GOOGLE EARTH MAPS; AND (7) "TEXT" THE EXTRANEOUS INFORMATION TO OTHER JURORS EVEN WHILE SITTING IN THE JURY BOX. THE INTERNET-JUROR'S ABILITY TO WREAK HAVOC ON THE JURY TRIAL SYSTEM PRESENTS A QUESTION OF SUCH EXCEPTIONAL IMPORTANCE TO THE PUBLIC'S CONFIDENCE IN THE JURY SYSTEM THAT THE COURT CANNOT WAIT FOR A *SPLIT IN THE CIRCUITS* --WHICH MAY TAKE YEARS—AS THE NUMBER OF "GOOGLE MISTRIALS"—CONTINUE TO GROW 22

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jose Antonio Rodriguez respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 15, 2010.

INTRODUCTION

This case, presents troubling *undisputed* facts that raise serious questions concerning the conduct of the trial, and whether the court of appeals "carefully reviewed" those undisputed facts before addressing petitioner's constitutional claim of being denied his right to a fair trial by *impartial* jurors. Although the trial looked typical, at least one juror was engaged in inappropriate *Internet-related misconduct* behind the scenes. Only after the trial did petitioner's counsel learn that a juror used the *Internet* to "read all about the attorneys in the case". Neither petitioner nor any court has ascertained precisely what the miscreant juror "read"; and whether it included *prior* court decisions, including the district court decision dismissing *all* of petitioner's claims and the Sixth Circuit's decision in *Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001 (6th Cir. 2007) *(Rodriguez I)*, affirming the dismissal of all claims, save the one claim that was remanded and tried. Although most likely the juror used the Internet to enhance his power position within the jury, petitioner was not able to determine what prompted Juror #4 to go on the Internet and read about the attorneys in the case.

OPINIONS BELOW

The November 15, 2010, opinion of the court of appeals is unreported (Slip Copy, 2010 WL 4721152 (6th Cir.)), and is set out at pp. 1a-4a of the Appendix. The January 5, 2011, order of the court of appeals denying rehearing which is not officially reported, is set out at pp. 39a-40a of the Appendix. The September 5, 2008 opinion of the district court, which is not officially reported, is set out at pp. 9a-36a of the Appendix. The September 17, 2008 order denying reconsideration of the district court, which is not officially reported, is set out at pp. 5a-8a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 15, 2010. A timely petition for rehearing en banc was denied on January 5, 2011. The Court has jurisdiction pursuant to 28 U.S. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . pubic trial by an impartial jury."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF CASE

The issues in this petition arise from the district court's refusal to give a *jointly* requested instruction that *specifically* prohibited the jurors from using the Internet *for any purposes* regarding the case. The district court did not even give the parties an opportunity to object. In addition, the district judge refused to conduct a post-verdict hearing. The fact is that a juror used the Internet. A hearing would have established that he used that extraneous information to deny petitioner a fair trial.

In other words, the district judge denied an instruction relative to use of the Internet and then compounded the error by denying a hearing relative to the effect of using the Internet.

The Sixth Amendment to the U.S. Constitution states in part, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury* of the state and district wherein the crime shall have been committed." (emphasis added) The civil litigant's right to an impartial jury inheres in the Seventh Amendment's preservation of a "right to trial by jury" and the Fifth Amendment's guarantee of due process. An impartial jury is one capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips*, 455 U.S. 209, 217 (1982) Because an impartial jury is obviously the touchstone of a fair trial, *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 554, 104 S.Ct. 845; 849, 78 L.Ed.2d 683 (1984) courts throughout modern history have labored to safeguard sitting jurors from extraneous information.

There is a fundamental contradiction between the concept of a fair trial, arduously developed over the last 300 years, and the rapid development of Internet technology over the last 10 years. A fair trial, if it involves nothing else, requires that the jury consider and evaluate only that evidence admitted in Court, and only witnesses subjected to cross examination. By contrast, the Internet provides access to a vast amount of information much of which is neither reliable nor true. Jury use of the Internet is an issue so explosive that it cannot be ignored, nor can the Court afford the luxury of waiting four of five years for a split in the circuits.

The new popular phrase "Google mistrial" was coined by journalist John Schwartz of the New York Times on March 18, 2009.[1] In a front page article entitled *As Jurors Turn To Google and Twitter, Mistrials Are Popping Up*, Schwartz wrote:

> "Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock. Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, wasting eight weeks of work by federal prosecutors and defense lawyers...

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[1] John Schwartz, *As Jurors Turn To Google and Twitter, Mistrials Are Popping Up*, N.Y. Times, March 18, 2009, at A1.

> [I]t might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges...
>
> [A] juror on a lunch or bathroom break can find out many details about a case. Wikipedia can help explain the technology underlying a patent claim or medical condition, Google Maps can show how long it might take to drive from Point A to Point B, and news sites can write about a criminal defendant, his lawyers or expert witnesses."

Id.

Importantly, the "information" found on the Internet is not necessarily true or valid and certainly not subjected to cross-examination.

Dr. Douglas L. Keene, a psychologist and past-president of the American Society of Trial Consultants writes in *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*[2]:

> "Social media is a fact of life. If the current patterns hold true, we *will see increasing numbers of jurors* for whom social networking is so habitual and life-integrated, they will be

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[2] Douglas L. Keene and Rita R. Handrich, *Online and wired for Justice: Why Jurors turn to the Internet (the "Google" mistrial)*, The Jury Expert, 21(6), 14-24, available at http://www.thejury expert.com/wp-content/uploads/KeeneTJENov2009.pdf.

> hard-pressed to see the justification for abstaining from 'updating their status' during trial. Really. If a *burglar can't resist checking his Facebook* status while in the high-adrenaline process of burglarizing your home, what's to stop a juror during courtroom tedium?" (Emphasis added).

Id.

Dr. Keene also stated:

> [b]y July 2009, more than half (56%) of American adults have accessed the internet by wireless means. Cell phone access (32%) is only slightly behind laptop access (39%) and now, on a typical day, 19% of us access the internet on a mobile device. This number may seem low to the uber–connect attorney, but it is up from only 11% in December, 2007—for a growth of 73% during that 16 month period.
>
> An interesting aside: African Americans are the most active users of mobile internet. 48% have used the internet on a mobile device and, on an average day, 29% go online. Additionally, growth in mobile handheld use on an average day since 2007 among African Americans is twice the national average - - up 141% as compared to the 73% average increase.
>
> * * *
>
> Yet, even with higher use among attorneys in general, younger attorneys are more comfortable with social media than their older

> colleagues. A recent survey conducted for LexisNexis reports that 86% of attorneys between the ages of 25 and 35 are members of social networks compared to only 66% of those over age 46.

Id.

Dr. Keene's prediction of an *increasing number of jurors accessing the Internet during the trial* has proved to be accurate.

In an article entitled *As Jurors Go Online, US Trials Go off Track* [3], legal commentator Brian Grow of Reuters Legal states:

> The explosion of blogging, tweeting and other online diversions has reached into U.S. jury boxes, in many cases raising serious questions about juror impartiality and the ability of judges to control their courtroom.
>
> Reuters Legal, using data from the Westlaw online research... compiled a tally of reported decisions in which judges granted a new trial, denied a request for a new trial, or overturned a verdict, in whole or in part, because of jurors actions related to the Internet.
>
> The data show that since 1999, at least "90 verdicts" have been subjected to challenges

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[3] Brian Grow, *As jurors go online, U.S. trials go off track*, Reuters, December 8, 2010, available at http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208.

> because of alleged Internet-related juror misconduct.
>
> More than half the cases occurred in the last two years. Judges granted new trials or overturned verdicts in 28 criminal and civil cases—21 since January 2009, the judges."
>
> In three quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors. These figures do not include the many incidents of juror Internet abuse that escapes judicial notice.

Id.

Gone are the days when a lawyer's greatest fear was that a juror was "sleeping" during the presentation of the client's case. In this Digital Age of the 21st Century, the fear is *not* whether the juror is sleeping. Rather, it is whether the juror is "Googling" potentially prejudicial information about the client, or criminal defendant, and then "texting" it to certain jurors. Given the dramatic emergence and staggering growth of social networking sites, the fear is warranted.

This sudden cultural shift to instant informational accessibility and social networking, which began with our youth—is not only being embraced by hundreds millions of adults and baby boomers—but at an alarming rate. Cellular telephones, iPhones, Androids, Smart-Phones, and Blackberrys and other handheld devices are the enablers of America's new social addiction and ever deepening dependency to "always

being connected". Increasingly, fewer and fewer Americans cannot imagine *leaving home without it*. See, Keen, supra, *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*, for startling statistics and demographical breakdowns.

Doubtless, these new technologies perform extremely important social and business functions. But they do not come without considerable costs.

The "rapid changes in the dynamics of communication and transmission of information" acknowledged by this Court in *City of Ontario, California*, et. al. v. *Quon* et. al. 560 U.S.___ 2010 (a text message case that implicated the Fourth Amendment) now poses a serious and imminent threat to the right to a fair trial by impartial jurors guaranteed by the Fifth and Sixth Amendments to the United States Constitution.

The "dire consequences" of the new technologies to the integrity of the jury trials was thoroughly addressed in a 2010 law review article by Amanda McGee entitled *Juror Misconduct In The Twenty First Century: The Prevalence of the Internet And Its Effects On American Courtrooms*.[4] McGee writes:

> [t]he advancement of technology and the instantaneous access to the Internet is now creating some dire consequences for courthouses nationwide. Increasingly, jurors have engaged

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[4] Amanda McGee, *Juror misconduct in the 21st Century: The prevalence of the Internet and its effect on the American Courtrooms*, 30 Loy. L.A. Ent. Rev. 301 (2009-2010).

> in Internet activity to conduct outside research regarding the cases they sit on, including the applicable laws and the parties involved. Through Facebook and Twitter, jurors are even posting messages, blogs, and "tweets" to the online community about what is occurring in the courtroom and during jury deliberations. As modern jurors engage in such Internet-related misconduct, courts nationwide are forced to declare mistrials, wasting both time and taxpayer money. (*Id.* pp. 301, 302)
>
> * * *
>
> [m]ost curious jurors do not realize that researching a party on the Internet or viewing a crime scene on Google Maps violates court rules about seeking evidence independently and should therefore be educated about the rules of juror misconduct. The only way to adequately educate jurors is to make instructions *very precise* in explaining what they may and may not do while engaged in a trial. Rather than just going through boilerplate orders, judges must give the jurors detailed instructions before the trial begins, prohibiting *all* device usage, and then repeat those instructions numerous times throughout the course of the trial. (*Id.* pp. 316, 317)

Id.

Virtually every juror, in every courtroom across the nation comes to court with a wireless mobile-Internet access that fits neatly in a pocket or purse. With new technologies placing vast amounts of information

about the parties, corporation, witnesses, the attorneys or the judge at the fingertips of jurors, *thousands* of "Google mistrials" are now only a "Point-and-Click" away. See *The Fourth Amendment and the Brave New World of Online* Marquette Law Review by Nathan Petrashek.[5] The article discusses in great detail the origin of social networking sites and its effect on the Fourth Amendment. It also explains why "People are flocking to social networking sites (Facebook at a rate of 200,000 per day) and *disclosing* more information than ever using these services." Petrashek, 93 Marq. L. Rev. at 1506.

The Court is faced with the fact that the revolutions in Internet technology have suddenly overwhelmed our jury trial system. This case presents exceptionally important questions that have overarching significance far broader then the parties. Indeed, it will affect every jury, in every court in the nation. Because of this case, the Court has the opportunity to address an absolutely important judicial question, now, before the judicial system is simply overtaken by "Google mistrials".

Petitioner, Rodriguez, a former employee of respondent FedEx Freight East, Inc. ("FedEx") filed suit in state court under Michigan's Elliott Larson's Civil Rights Acts (ELCRA), Mich. Comp. Laws §§ 37.2101 et seq. alleging claims of constructive discharge, retaliation, hostile work environment and failure to promote because of his Hispanic accent. Citing diversity of citizenship, FedEx removed the suit

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[5] Nathan Petrashek, *The Fourth Amendment and the Brave New World of Online Social Networking*, 93 Marq. L. Rev. 1494, 1509

to the United States District Court for the Eastern District of Michigan. *In re Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001 (6th Cir. 2007) ("*Rodriguez I*"). FedEx filed a motion for summary judgment which was referred to the bankruptcy court after Rodriguez filed for bankruptcy. The motion was granted, and the decision was affirmed by the district court. *Id.* at 1005. Rodriguez appealed to the Sixth Circuit Court of Appeals.

On June 27, 2007 the Sixth Circuit held that the decision maker's disparaging comments concerning Rodriguez's Hispanic accent constituted direct evidence of national origin discrimination and remanded the failure to promote claim back to the district court. The district court's dismissal of all other claims was affirmed. *Id.* at 1005. Rodriguez appealed to the Sixth Circuit Court of Appeals.

On June 20, 2008, FedEx filed the Parties' Joint Proposed Jury Instructions in the district court. (Docket No. 2:08-CV-10637, R. 35, p. 18) Recognizing the widespread accessibility to information on the Internet—including the Sixth Circuit's written opinion in *Rodriguez I,* "both" parties agreed that the jurors should be specifically admonished from using the Internet for any purposes regarding the case. The specific "Internet" prohibition instruction (No. 13) read as follows:

> Jurors Not to Consider Information
> Received Outside Presence of Court
>
> The only information that you will receive about this case should come to you in this

courtroom. You must consider any information which may come to you outside this courtroom.

You must not make any investigations on your own or conduct experiments of any kind. This includes using the Internet for any purpose regarding this case.

If you discover a juror has violated my instructions, you should report it to me. (Emphasis added)

Id.

The record shows that the district court did *not* give the "jointly" requested instruction No. 13. Instead, the district court *inexplicably* gave an instruction that excluded the word "Internet". That instruction stated:

"Now a few words about conduct as jurors.

First, I instruct you that during the case you should not discuss the matter with anyone or permit anybody to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you ought not talk about the case.

Secondly, do not read or listen to anything about the case in any way. If someone tries to talk to you about the case, bring it to the Court's attention promptly.

Third, *do not try to do any research* or make any investigation bout the case on your own, and finally, you ought not form any opinions

> about the outcome of the case until after you heard all the evidence. Keep an open mind until you start your deliberations at the end of the case." (Emphasis added)

Docket No. 2:08-CV-10637, R. 80, Tr. Vol. 1A, pp. 55-56.

The record also shows that the district judge did not explain his refusal to give the "Internet" instruction, nor did the district judge provide the parties with an opportunity to object pursuant to Fed. R. Civ. P. Rule 51(b)(1)(2).

Trial commenced on June 23, 2008 and ended on June 27, 2008. Following the close of proofs the district judge informed the eight jurors that *at least seven* of them must agree on a verdict. (Docket No. 2:08-CV-10637, R. 72 Tr. Vol. 5B, p. 20) After a few hours of deliberations the jury advised the court that a verdict had been reached. *Id.* at 25. The polling of jurors showed that *seven* of the eight jurors agreed on a verdict in favor of FedEx. *Id.* at 26. The district judge then told the jurors they were "excused", but that [he would] be coming back to talk with them before they leave. The record shows that counsels were not told that they could not talk to the jurors after they were excused.

After the jurors were discharged, petitioner's lead trial counsel, D. Rick Martin greeted and thanked all eight jurors for their service—while standing near the courthouse security checkpoint in the presence of U.S. Federal Marshals. (Docket No. 2:08-CV-10637, R. 48, Ex. 2) That is where juror #4 stated that he read all about the attorneys in the case on the "Internet"; and

knew that [petitioner's counsel D. Rick Martin] was a former United Automobile Workers (UAW) plant president. *Id.*

Petitioner's counsel timely filed a motion for a new trial or, in the alternative, a post-trial hearing on the juror misconduct issue. (Docket No. 2:08-CV-10637, R. 48) The motion was supported by several sworn affidavits, including affidavits from juror #5 (Docket No. 2:08-CV-10637, R. 50, Ex. 1, "Affidavit as to J.Callahan") and juror #2. (Docket No. 2:08-CV-10637, R. 50, Ex. 3, "Affidavit as to P. Hargrove") Both jurors attested that soon after the jury was released to begin deliberations, juror #4 told them that he knew all about the attorneys in the case because he went on the Internet. *Id.*

The jury foreman attests in pertinent part:

> 2. On June 27, 2008 the judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.
>
> 3. Myself, Juror #4, Juror #1, Juror #7, and Juror #8, went out to get lunch. Before we began deliberations Juror #4 told us that he went on the Internet and read all about the attorneys in the case.
>
> 4. Juror #4 led the discussions in deliberations against finding in favor of Mr. Rodriguez and for finding in favor of FedEx.

Affidavit as to J.Callahan.

Juror #2 similarly attests:

> 2. On June 27, 2008 the Judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.
>
> 3. It was decided that one juror would go and bring back lunch for the rest of us. However, five jurors decided to go get the lunch. Among the five jurors was Juror #4. He had told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company. He stated he learned about the attorneys from the Internet.
>
> 4. When the five jurors returned, Juror #4 began arguing in favor of FedEx. Three jurors who left with him to bring back our lunch immediately agreed with Juror #4.

Affidavit as to P. Hargrove

Petitioner's counsel also filed an affidavit which attests:

> 3. Juror #4 told me that he learned all about the attorneys in the case from the Internet.
>
> 4. Juror #4 stated that he went online and read all about our background, education, and areas of practice. He stated that he knew that I was a former president in the UAW. Juror #4 also stated that he knew all about FedEx's attorney, her background, and the law firm she is with.

Docket No. 2:08-CV-10637, R. 48, Ex. 1, "Affidavit as to D. Martin"

The district court denied petitioner's motion *without* oral argument and *without* a hearing. The district judge stated that "[T]here are no exceptional or extraordinary circumstances warranting relief from the verdict under Rule 60(b)(6)." (Docket No. 2:08-CV-10637, R. 62, p. 8).

Petitioner timely filed a motion for reconsideration and specifically requested an evidentiary hearing limited to the juror misconduct issue. (App. R. 63) The request was denied. (App. R. 64) The district judge stated: "Although the Michigan Model Civil Jury Instruction 2.07 was offered as a *proposed* jury instruction it was not given." *Id.* (emphasis in original) In refusing to conduct an evidentiary hearing the court stated "there is absolutely no evidence that Juror #4 accessed the prior Sixth Circuit opinion in this matter." That is simply because the district court refused to hold a hearing.

Petitioner timely appealed to the Sixth Circuit. On November 15, 2010 the Sixth Circuit affirmed the district court's decisions. (App. 1a) Surprisingly, the Sixth Circuit did not analyze the district court's refusal to give the *jointly* requested Internet admonition, or its refusal to conduct a post-trial hearing to determine whether the extraneous *case-related* information tainted the integrity of the verdict. *Id.*

In a *passing* footnote the Sixth Circuit addressed amicus curiae briefs filed by the Michigan Association for Justice (App. 4a) and the National Lawyers Guild.

Id. Both organizations requested that the Sixth Circuit: (1) require all federal district court judges to give instructions that specifically prohibited jurors from using the Internet for any purposes regarding the case; (2) grant a new trial; and in the alternative; (3) remand the case back to the district court for an evidentiary hearing to determine whether the extraneous information tainted the integrity of the verdict. Mich. Assoc. of Justice, Amicus Brief filed July 2, 2009, in 6th Cir. case no. 08-2272; NLG Amicus Brief filed July 1, 2009, in 6th Cir. case no. 08-2272.

In denying the requested relief the Sixth Circuit stated:

> "The National Lawyers Guild and the Michigan Association for Justice have each moved for permission to file amicus briefs in this appeal. The National Lawyers Guild urges us to create a model jury instruction for civil cases forbidding jurors from accessing the internet and the Michigan Association for Justice urges us to make an investigatory hearing mandatory any time a juror does access the internet. Because we, as a three-judge panel, are not empowered to make these proclamations and because our disposition of this appeal pretermits these arguments, we DENY the motions."

App. 4a.

On December 13, 2010, petitioner timely filed a motion for rehearing en banc. On January 5, 2011, the motion was denied. (App. 39a).

In other words, the district court and then the Sixth Circuit Court of Appeals avoided addressing the issue that affects every trial in this country. Importantly, this issue is policy neutral. While the plaintiff was deprived of a fair trial in *this* case, the next time it will be a corporate defendant, or a criminal defendant.

On January 5, 2011 the Sixth Circuit granted petitioner's motion to stay the mandate until the disposition of the petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

> "Stoam Holdings, the company trying to overturn the $12.6 million judgment said a juror, Johnathan Powell, had sent Twitter messages during the trial. Mr. Powell's messages included 'oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12 m lighter' and 'So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money.'"

Schwartz, supra, n.1.

As the above illustrates, the increasingly prominent role the social media and the Internet plays in the 21st Century, poses an imminent and serious threat to the jury trial system—the cornerstone of our democracy.

The case for granting the petition is perhaps best made by jury trial expert, Jeffrey T. Frederick, the Director of the Jury Research Services Division of the

National Legal Research Group, Inc. The following are excerpts from an article entitled *You, the Jury, and the Internet*[6], published in 2010 by the American Bar Association:

> As the Internet has gained widespread acceptance as a source for news and information, it has become a serious contender for concern regarding juror exposure to case-related information and opinions. Information relating to a case, either indirectly or directly, can reach jurors via a variety of Internet avenues: computers, cell phones, personal digital assistants, and the like. *Once on the Internet, jurors may encounter case-relevant information from commercial and news media-related Web sites*, customized information and content into a multibillion-dollar business, even gaining entry into our culture – and dictionaries – as the verb for Internet searching itself, i.e., "to google." While the overall scope of the problem of jurors researching case-related issues on the Internet is unknown, *anecdotal evidence has been surfacing with increasing frequency that jurors regularly turn to the Internet for answers*...Using the Internet provides unique challenges in jury trials. The Internet provides jurors with greater access to information through search engines, media sources, party-oriented Web sites, and blogs. Each of these may *pose a threat to juror impartiality*. Attorneys and judges need to

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[6] Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39(2) The Brief (2010).

> recognize that many jurors view such tools as being qualitively different from the traditional research tools and media sources forbidden by the courts. Hence, courts, with the help of attorneys, must design effective instructions and strategies for minimizing such undesirable activity.

Id.

American jurisprudence has spent the last *three hundred years* structuring methodologies to ensure fair and unbiased trials. Those structures include cross examination, careful development of evidentiary rules, and imposition of rules on the trial judge to control the information obtained by the jurors. The reason for those carefully developed procedures is the recognition that *biased* jurors will reach *unfair* conclusions. The Internet provides a powerful weapon to those very jurors intent on undermining the principle of a fair trial.

I. THE RAPID DEVELOPMENT OF TECHNOLOGY HAS PLACED IN THE HANDS OF EVERY JUROR THE CAPABILITY TO (1) OBTAIN EXTRANEOUS INFORMATION REGARDING A PARTY, WITNESS, LAWYER OR THE JUDGE (2) OBTAIN EXTRANEOUS INFORMATION CONCERNING THE FACTS IN THE CASE ITSELF, INCLUDING PREVIOUS OPINIONS AND COURT OF APPEALS DECISIONS; (3) OBTAIN OTHER LAWSUITS FILED AGAINST CORPORATE DEFENDANTS; (4) OBTAIN "LEGAL" DEFINITIONS AND STATUTES; (5) OBTAIN CRIMINAL BACKGROUND HISTORY; (6) OBTAIN YOUTUBE VIDEOS, PHOTOGRAHS, VIDEO DISCOVERY DEPOSITIONS, GOOGLE EARTH MAPS; AND (7) "TEXT" THE EXTRANEOUS INFORMATION TO OTHER JURORS EVEN WHILE SITTING IN THE JURY BOX. THE INTERNET-JUROR'S ABILITY TO WREAK HAVOC ON THE JURY TRIAL SYSTEM PRESENTS A QUESTION OF SUCH EXCEPTIONAL IMPORTANCE TO THE PUBLIC'S CONFIDENCE IN THE JURY SYSTEM THAT THE COURT CANNOT WAIT FOR A *SPLIT IN THE CIRCUITS* --WHICH MAY TAKE YEARS—AS THE NUMBER OF "GOOGLE MISTRIALS"—CONTINUE TO GROW

Accessing the mobile Web is a daily activity for 22.4 million mobile users in the U.S., according to research released by comScore. Between January 2008 and January 2009, the number of daily mobile web users doubled.

* * *

> A doctor who blogged under the pseudonym "Flea" decided to blog his own medical malpractice trial. *He blogged about the trial, his impressions of the plaintiffs' lawyer* (whom he nicknamed) and said jurors were dozing off. He was on the stand when, in a "Perry Mason moment" the plaintiff attorney said, "Are you Flea?" and he actually admitted he was. The plaintiff's attorney was obviously prepared to delve into the blog in open court and the case settled. (emphasis added)

Keene, supra, n.2.

Every day, in every courtroom across America, litigants face the very real danger of their case being decided, not by the evidence presented within the confines of the courtroom; but by information *streamed* into the deliberative process from *Cyberspace*. This Digital age information is now at the fingertips of every juror who walks into the courtroom with an *I-Phone, Smartphone, Blackberry*, or even a low cost *cell phone*. Gone are the days when rogue jurors had to endure the inconvenience and risk exposure by traveling to the library or to a crime scene to collect information to bolster their *predisposed* positions. Now, jurors can just—"*Google it*."

Jurors willing to use the Internet *are* capable of, and *will* inject bias into the process. See *Reining in juror misconduct: practical suggestions for judges and*

lawyers;[7] The Internet also allows jurors to communicate secretly with each other and discuss the case during the trial by using *pseudo* names to text, e-mail, blog, or tweet information. See Frederick, supra, n.6, *You, the Jury, and the Internet*.

The exclusionary rule would have no meaning if jurors could just Google newspaper accounts of the investigation, or criminal history or record properly excluded by the rules of evidence. Indeed, this is the very sort of juror misconduct that results in a criminal defendant being convicted based upon "information" accessed in *Cyberspace*, though the prosecutor plainly failed to present sufficient evidence in the Courtroom to support a conviction.

On January 1, 2010, the Florida Bar Journal published the following in an article entitled, "*Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*":

> "(6) Some jurors will want to text what they are doing at any given and why they are doing it to friends, family and strangers. To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. Jurors have the capability instantaneously to tweet, blog, text, e-mail, phone, and look up keep their digital 'windows to the world.' *Jury instruction by the judge*

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[7] Ralph Artigliere, Jim Barton, Bill Hahn, *Reining in juror misconduct: practical suggestions for judges and lawyers*, 84 Fla. Bar J. 8 (2010).

about communication outside the courtroom has not kept pace with technology. (emphasis added)

(7) The problem of outside influence on jurors is no longer confined to high profile cases that are covered in the press or other media. Courtroom misconduct seems to be everywhere. Recently, *a witness in Miami was discovered texting his boss about his testimony during a sidebar conference resulting in a mistrial*; (8) a South Dakota juror in a seat belt product liability case Googled the defendant and informed five other jurors that the defendant had not been sued previously; (9) a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the Internet resulting in a motion for mistrial; (emphasis added) (10) a juror in Bartow, Florida, looked up a defendant's 'rap sheet' online and told fellow jurors, resulting in a mistrial; and jurors in Florida criminal case made anti-Semitic comments to each other and consulted one of the jurors' accountants during deliberations by telephone. (11) Nine of the jurors on a deliberating panel in a federal case in Miami admitted to the judge that they had been doing research on the case over the Internet, resulting in a mistrial. (12) *The judge learned that the jurors were Googling the lawyers and the parties, finding news articles about the case, researching definitions and information on Wikipedia, and looking for evidence that had been excluded in the case.* All of this was accomplished despite the judge's repeated instruction not to do so. (13) These examples represent recent transgressions that were

> discovered, and probably represent *just the tip of the iceberg* of juror behavior. (emphasis added)
>
> (14) Another dilemma is that jurors digitally linked to the outside world may receive unsolicited information relating to the trial from friends and family who know about their jury service. They may receive texts or e-mails inquiring about how the case is going or whether it is interesting. Outsiders thinking they are being helpful may forward articles or other materials they have found on the Internet to jurors. Texts or tweets may include unwanted advice or input on the 'hang that crook!' variety. It will be hard for the juror not to read such incoming material. Thus, a juror who does not intend to go looking for information or influencing commentary from others gets it anyway."

Artigliere, supra, n.7.

Judicial efficiency commands that this issue be addressed immediately before mistrials are accumulated en masse.

On July 22, 2010 USA Today[8] reported on Facebook's[9] celebration of its 500 millionth member—a

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[8] Kristin McGrath, *Status update: Facebook logs 500 million members*, USA Today, July 22, 2010, at D3.

[9] Facebook: www.facebook.com – Facebook is a social networking tool that allows people to communicate with their friends, family, and coworkers.

milestone reached on July 20, 2010—just *six years* after coming into existence. Kristin McGrath wrote:

> Facebook has amassed 100 million new members since February [2010] alone.
>
> "My prediction is that we'll reach a billion users on Facebook," says James Fowler, co-author of Connected: *The Surprising Power of our Social Networks*.
>
> Facebook's exponential growth, Fowler says, reflects the "classic" growth pattern of networking technologies. First comes the steady trickle of early adapters. Their real-life social networks become the next wave, which eventually draws in even those who are hesitant to embrace the technology – older generations who can now view pictures of their grandchildren on Facebook...."
>
> "Whether we're 500 million or a billion or more, it's still all about the site being personal and relevant for every individual," says Zuckerberg. "We really still think of ourselves as at the beginning of the journey."

Id.

In addition to Facebook, jurors have access to several other popular social networking sites to search for prejudicial information to bolster their position and enhance power in the jury room. These sites include

MySpace[10] which has more than 125 million worldwide users, and LinkedIn[11], a business networking site with approximately 90 million members.

The most popular micro-blogging site is Twitter[12]. It has approximately 105 million users. New users are signing up at a rate of 300,000 per day.

At Chirp, the official Twitter developer conference, Twitter shared some revealing stats about its site, users, and growth that had previously been kept under wraps. Here is a summary of the facts and figures Twitter shared:

- Twitter now has 105,779,710 registered users.
- New users are signing up at the rate of 300,000 per day.
- 180 million unique visitors come to the site every month.
- 75% of Twitter traffic comes from outside Twitter.com (i.e. via third party applications.)

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[10] MySpace: www.myspace.com – MySpace users create a profile and upload personal information.

[11] LinkedIn: www.linkedin.com – LinkedIn is a networking tool geared towards establishing and expanding business and professional contacts. It allows members to gather and share data, and collaborate on projects.

[12] Twitter: www.twitter.com – Twitter allows users to post limited messages that are then distributed to other users.

- Twitter gets a total of 3 billion requests a day via its API.

- Twitter users are, in total, tweeting an average of 55 million tweets a day.

- Twitter's search engine receives around 600 million search queries per day.

- Of Twitter's active users, 37 percent use their phone to tweet.

- Over half of all tweets (60 percent) come from third party applications.

- Twitter itself has grown: in the past year alone, it has grown from 25 to 175 employees.

Social media poses significant problems to the principles of a fair trial. It exposes the Internet-juror to certain "information" that will make it impossible to remain impartial. For example, an Internet-juror can hardly be expected or trusted to remain impartial after reading scathing derogatory rants about the plaintiff/employee, CEO/defendant or the criminal defendant—posted on Facebook by an ex-spouse, an ex-Facebook "friend", disgruntled co-worker or former business partner. See Jeffrey T. Frederick, *You, the Jury, and the Internet*, 39(2) The Brief (2010).

Manifest injustice will occur when an Internet-juror reads a Web-blog that discusses the litigant's *attorney's* political positions on highly controversial issues. Query: What protection does a litigant have against a juror that decides to vote against the litigant after discovering "Online" that the juror has sharp

disagreements with the litigant's attorney's political positions or religious beliefs. Sadly, the answer is—none.

The Internet can also taint the integrity of jury deliberations with information about corporate defendants that was either not disclosed during the trial or excluded by the judge. For instance, a juror can instantly find out about *other* lawsuits or class actions filed against the corporate defendant, simply by Googling its name. "Wikipedia" will reveal to the Internet-juror corporate assets, revenues, and even political donations that may never have been disclosed during the trial. This sort of extrajudicial information arms the Internet-juror with exceptional power and influence to weld over fellow jurors.

For example, if a juror discovers in his Internet research that the corporate defendant has paid millions in *similar* anti-trust or products liability lawsuits based upon the *same* defenses, the juror can use that that extraneous information whether it is accurate or not, to sway fellow jurors to vote against the defendant.

Video depositions of parties or expert witnesses are being posted by attorneys on their ads, websites, or blogs in anticipation of the trial and sleuthing jurors. Jurors have been caught setting up their own web-blog during the trial, and even taking an "online" poll on whether to vote guilty or innocent. See, Keene, supra, n.2.

While outrageous, it reflects American Idol culture, not judicial fairness. John Cord in *"Cell Phones and Juror Misconduct in Maryland's Courts"* states[13]:

> "The news and blogosphere has been chock-full of stories the past year about social networking in the courtrooms. There have been incidents of witnesses receiving text messages while giving testimony, and jurors posting status updates while in the jury box and doing internet research during deliberations. Some result in mistrials, and many lead to lengthy appeals that delay final justice.
>
> Most courts deal with the reality of social networking on a very reactive basis. Given the relatively recent explosion of networking sites, courts and rules committees have not yet addressed networking in the courtroom, with most restrictions being imposed individually by judges with little guidance. The principal issue presented to judges is whether to allow lawyers, witnesses and jurors access to their cell phones that almost universally have access to text messaging if not internet access. With internet access, the user has direct access to read and post messages on sites like Twitter and Facebook."

Id.

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[13] John Cord, *Cell Phones and Juror Misconduct in Maryland's Courts*, Generation J.D., Sep. 30, 2009, available at http://thedailyrecord.com/generationjd/2009/09/30/cell-phones-and-juror-misconduct-in-marylands-courts/.

More fundamentally, information fetched in *Cyberspace* from Google, Facebook and Twitter deceptively evades the rules of evidence developed over centuries, particularly the strict prohibitions against hearsay. *Cyberspace* information also contemptuously avoids the most reliable *search engine* ever invented for finding the truth—*courtroom cross-examination*.

Even more disturbing, there are confirmed reports of jurors and even judges requesting to be Facebook "*friends*" with the parties or witnesses or the attorneys—*during the trial, itself*. See Keene, supra, n.2, *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google mistrial")*.

Legal commentator and defense attorney Ken Strutin made the following observation in an article published in the New York Law Journal on May 20, 2009[14]:

> The indiscriminate use of blogs, tweets and text messages is assailing the sanctity of deliberations and threatening the constitutional rights of criminal defendants to a fair trial. As courts attempt to come to terms with technologically empowered jurors, new approaches and assumptions about the jury trial will be needed.
>
> In a spate of recent cases, the online behavior of sitting jurors has prompted defendants to

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[14] Ken Strutin, *Jury Deliberations in the Digital Age*, N.Y. L.J., May 20, 2009, available at http://www.law.com/jsp/article.jsp?id=1202430828839&slreturn=1&hbxlogin=1.

> challenge the fairness of verdicts in criminal and civil cases.

Id.

Also, a troubling threat to the integrity of the jury trial system is the Internet-juror's ability to access *"case-related"* information. With the advent of E-filing in the federal court system, motions, orders, written opinions on summary judgment motions, and court of appeals opinions related to the case on which the jurors are deciding, are easily accessible to jurors on the Internet.

Put simply, if a juror has a bias, or if a juror has a prejudice, that juror can use the Internet to bolster his or her position to attack the *objective* evidence presented in the courtroom. He or she will use that power to unfairly alter the jury verdict. The juror may or may not reveal the use of the Internet. Only judicial vigilance can protect the integrity of the system. Only the Supreme Court can enforce that vigilance.

If a juror obtains any extraneous information about the case, whether it is related to previous decisions, *undisclosed* facts about the case, the parties, or the attorneys it calls into question the integrity of the juror, and therefore, the verdict itself.

Trial court judges across America are scrambling to find effective means to protect the integrity of the jury trial system from both biased jurors and naïve jurors who cannot resist the temptation [or addiction] to Google or Tweet—on the case they are deciding. That challenge, without concrete guidance or leadership

from higher courts—is becoming increasingly more difficult and frustrating for the trial judges.

Regrettably, too often that challenge is not met. Too many judges simply fail to appreciate or comprehend the "rapid changes in the dynamics of communications..." *Quon*, supra., and the havoc it is wreaking on our jury trial system. The number of "Google mistrials" is alarming and is bound to rise even higher unless the Court steps in. Many legal commentators and scholars also acknowledge the need for uniform standards and guidance from the Court. See, e.g., Daniel A. Ross, *Juror Abuse Of the Internet*[15] which states that "[j]urors across the country have researched and discussed their trials via the Web, leading to mistrials and wasting weeks of litigation." Ross expressed concern about the "ineffective" control courts have over "online information" accessed by jurors which "can be "incorrect or incomplete".) *Id.* Paula Hannaford-Agor, the Director of the Center for Jury Studies at the National Center for State Courts, *Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards* published in Jury News, 2009, Vol. No. 24. Issue 2.[16] ("Examples of juror misconduct via technology have become so widespread and alarming that a new expression has developed to describe the problem: Google mistrials") *Id.* Dr. Keene *"The Dark Side of the Internet: In the Jury Room"*

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[15] Daniel A. Ross, *Juror Abuse of the Internet*, N.Y. L.J., Sept. 8, 2009 (need subscription to view per http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202433617873.

[16] Paula Hannaford-Agor, *Google Mistrials, twittering Jurors, Juror blogs,and other technological hazards*, 24 Ct. Manager, Issue 2, p. 42, available at http://www.ncsconline.org/D_Research/cjs/JuryNews2009Vol24No2.pdf.

(2009)[17] ("a justice system designed for a simpler time...") *Id.*

Approximately 3,500 to 5,500 federal civil and criminal jury trials are held each year. Given the ubiquity of cell phones, society's addiction to instant information, and the social networking phenomenon of Facebook and Twitter, it is not inconceivable that the number of "Google mistrials" could jump into the *thousands*. When mistrials occur everyone loses. Clients lose thousands and in some cases millions of dollars in attorney fees and litigation costs. Taxpayers lose tax dollars and the court loses valuable judicial resources.

Perhaps the greatest loss is the one sure to be suffered by the public. "Google mistrials" necessarily undermines the public's confidence in the court's ability to ensure the fairness of trial proceedings.

II. AN INSTRUCTION SPECIFICALLY PROHIBITING JURORS ACCESSING THE INTERNET IS NECESSARY TO PROTECT WITNESSES WHO MAY BE RELUCTANT TO TESTIFY OUT OF CONCERN THAT JURORS MAY TRY TO FIND THEM ON FACEBOOK OR TWITTER OR OTHER SOCIAL NETWORKING SITES

"Google mistrials" can also have a chilling effect on millions of potential witnesses who are on Facebook or MySpace or some other social networking sites. It is

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[17] Douglas L. Keene, Ph.D., Rita R. Handrich, Ph.D., *The Dark Side of the Internet: In the Jury Room*, Oct. 8, 2009, available at http://www.keenetrial.com/articles_15_2510325171.pdf.

essential that these witnesses feel secure in knowing that trial judges will instruct and make it clear to jurors that they are not allowed to *click* onto the witness' Facebook or any other social networking site.

Without such an admonishment many witnesses may chose not to appear and testify in jury trials in order to protect one's personal and private affairs, family members and friends from sleuthing Internet-jurors trolling for information to enhance their positions.

That is why the Court must step in. Trial court judges need concrete guidance, uniform standards, and the leadership that only this Court can provide.

Admittedly, this case does not involve a split in the circuits on whether a district court must give an instruction specifically prohibiting the jurors from using the Internet for purposes regarding the case. However, the Third, Eighth and Ninth Circuit Court of Appeals, unlike the Sixth Circuit, have formulated model/form instructions that *specifically* prohibit jurors from using the Internet for any purposes regarding the case. That instruction must be given to jurors by the trial judge.

In addition, the Sixth Circuit's decision to uphold the district court's refusal to give the jointly requested *Internet* instruction is inconsistent with the position recently taken by the Judicial Conference Committee on Court Administration and Case Management (CACM). On January 28, 2010, the CACM sent a "Memorandum" to the United States District Courts that recognizes the havoc the Internet wreaking on the jury trial system. The CACM "endorsed a set of

suggested jury instructions that district judges should consider using to help deter jurors from using electronic technologies to research or communicate about the case on which they serve."[18]

The letter also states: "*[T]he suggested instructions [attached] specifically inform jurors that they are prohibited from using these technologies in the courtroom, in deliberations, or outside the courthouse to communicate about or research cases on which they currently serve.*" *Id.*

Given the rising number of the Internet-related incidents of misconduct, the CACM instruction should not be "suggested"—but "mandated". Indeed, one need look no further then this case to see why.

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[18] Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Comm. on Court Admin. and Case Mgmt. to Judges, United States Circuit Courts (January 28, 2010) available at http://www.judges.org/pdf/jury- instructions-cip10.pdf.

III. THE DISTRICT COURT'S REFUSAL TO CONDUCT A POST-TRIAL HEARING TO (1) DETERMINE WHETHER THE CASE-RELATED INFORMATION ACCESSED ON THE INTERNET BY JUROR #4 TAINTED THE VERDICT AND (2) GIVE PETITIONER AN OPPORTUNITY TO DEMONSTRATE THAT THE EXTRANEOUS INFORMATION DEPRIVED PETITIONER OF THE RIGHT TO A FAIR TRIAL BY IMPARTIAL JURORS SHOULD BE REVIEWED

It is fundamental that every litigant who is entitled to trial by jury is entitled to an impartial jury, free to the furthest extent practicable from extraneous influences that may subvert the fact-finding process. See *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981); *Kiernan v. Van Schraik*, 347 F.2d 775, 778 (3d Cir. 1965) Motions for a new trial on the basis of juror misconduct are left to the sound discretion of the trial court.

In this case, it was established that a juror specifically used the Internet to investigate the case and the attorneys. Yet, the district court not only denied petitioner's motion for a new trial or post-trial hearing, but did so without allowing oral argument. A hearing was warranted in this case, at least, because the district court knew that the court's dismissal of petitioner's entire lawsuit in *Rodriguez I* in addition to other adverse decisions rendered against petitioner were accessible to the public on the Internet.

Without determining the scope and breadth of what juror #4 read on the Internet, the court lacked a

rational basis to declare that the extraneous information did not taint the integrity of the verdict. *Wellons v. Hall,* 588 U.S. ___ (2010) Fundamental principles of due process as pronounced by precedents of this Court entitled petitioner to a post-trial hearing, at which petitioner would have the opportunity to demonstrate that juror #4's misconduct deprived him of his right to a fair trial by impartial jurors. *Smith v. Phillips*, 455 U. S. 209, 215-216 (1982); *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 556 (BLACKMUN J. concurring) *Wellons*, supra. ("After all, had there been discovery or an evidentiary hearing, Wellons may have been able to present more than "speculation" and mere "surmise.")

Moreover, where, as here, the claim of juror misconduct is based upon extraneous information, prejudice is presumed, and a hearing is mandated. See *Mattox v. United States,* 146 U. S. 140 (1892); *Stiles v. Lawrie,* 211 F.2d 188 (6th Cir. 1954); *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977).

With access to the Internet and *case-related* information now available with the simple use of a cell phone, the question of jury conduct using the Internet to obtain extraneous information is of "exceptional importance."

The Sixth Circuit also violated its own binding precedents established in *Nevers v. Killinger,* 169 F.3d 352 (6th Cir. 1999); see also *McCoy v. Goldston*, supra; and *Stiles v. Lawrie,* supra; *Krause v. Rhodes,* supra. Like in *Wellons*, supra., the Sixth Circuit's decision was made without knowing the breadth and scope of the rogue juror's Internet research. In the absence of any factual findings, it was plainly impossible for the

district court judge to determine whether the extraneous information tainted the jury's verdict.

This issue of juror-Internet misconduct has achieved prominence because it fundamentally affects jury trial procedure. Courts need guidance. More importantly, in the case at bar, petitioner was denied the opportunity to investigate the effect the Internet had on the decision-making process of the jury. At the very least, a hearing was mandated. For both reasons, the judgment should be reviewed.

What is expected from our judicial system is not an error free trial, but a trial process that is properly handled to achieve a fair and just result. That fair and just result was not achieved in this case.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

> Even just a cursory search on Twitter using the key words "court" and "jury duty" revealed the following two tweets: "Selected for jury duty. No tweeting from the box—court's order. We solemnly swore not to tweet" and "dudes I am twittering in court, THE FUTURE OF JURY DUTY."

McGee, supra, n.4.

These two "Tweets" begs the question: what *is* the future of our jury trial system when jurors while sitting in the jury box or during breaks are able to use their mobile devices to Google, Text, Blog, and Tweet about the trial.

This case presents the Court with perhaps its first opportunity to provide concrete guidance and leadership to trial judges grappling daily with these extremely thorny issues–issues created by a "brave new world of technology."

The right to a fair trial by impartial jurors is arguably the most important right in a free and open society.

That right, however, is being threatened *every day* in *every* courtroom in the country by jurors who simply cannot resist the temptation to do research with their Cellular telephones, Androids, Blackberrys, iPhones, Smartphones, Evo-4s, laptops and home computers; or to discuss the case they are in the process of deciding on such social networking sites as Facebook, Twitter, MySpace, and LinkedIn—to name just a few.

The question of whether trials will be decided by information obtained in *Cyberspace*, or by evidence tested within the confines of the courtroom–can only be answered by this Court.

This case provides the Court with an appropriate vehicle to address the following questions of exceptional public importance. The procedures to be followed relative to the use of the Internet during jury trials. The procedures to be used once the violation is discovered. The methodology to be used in determining whether a fair trial has been denied.

The right to a trial by an impartial jury is too important, and the threat to that right too great, to allow the Sixth Circuit's decision to stand. Trial judges throughout the nation eagerly await the much needed

concrete guidance, constitutional standards–and the leadership that only this Court can provide.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted, to review the judgment and opinion of the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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Counsel for Petitioner

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-2272

[Filed November 15, 2010]

In re: JOSE ANTONIO RODRIGUEZ,	)
	)
Debtor,	)
	)
	)
STUART GOLD, TRUSTEE FOR, THE ESTATE OF JOSE ANTONIO RODRIGUEZ,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellee.	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Before: BATCHELDER, Chief Circuit Judge; SUTTON and KETHLEDGE, Circuit Judges.

ALICE M. BATCHELDER, Chief Judge. Jose Rodriguez sued his former employer, FedEx Freight East, Inc., alleging various claims of discrimination and retaliation on the basis of his race, in violation of Michigan's Elliott-Larsen Civil Rights Act ("ELCRA"), Mich. Comp. Laws §§ 37.2101 *et seq*. FedEx obtained summary judgment on all claims and, on appeal, we affirmed that judgment except as to Rodriguez's claim that FedEx had refused to promote him because of his Hispanic accent. That claim we remanded for trial. *In re Rodriguez*, 487 F.3d 1001 (6th Cir. 2007).

On remand, the case was tried to a jury and the jury returned a verdict for FedEx. Rodriguez moved for JNOV, mistrial, a new trial, and an order striking certain testimony. He alleged errors based on juror misconduct, evidentiary rulings, jury instructions, defense counsel misconduct, insufficiency of the evidence, and the court reporter's misconduct. The district court considered the motion and authored a thorough and meticulous 19-page opinion denying it. *See Rodriguez v. FedEx Freight East, Inc.*, 2008 WL 4155677, at *13 (E.D. Mich. Sept. 5, 2008) (unpublished). Rodriguez moved for reconsideration and the district court denied that motion as well. *See Rodriguez v. FedEx Freight East, Inc.*, 2008 WL 4290180, at *2 (E.D. Mich. Sept. 17, 2008) (unpublished).

After carefully reviewing the record, the law, and the briefs and arguments on appeal, we find that the district court's opinion correctly sets out the applicable law and correctly applies that law to the facts in the

record. But we think it wise to address very briefly Rodriguez's claim that the district court erred in refusing to give the "mixed motive" jury instruction Rodriguez requested. The district court properly instructed the jury using the Michigan Model Civil Jury Instructions, including the instructions explaining Michigan's definition of employment discrimination and the burden of proof for Michigan employment discrimination cases. Those instructions explicitly explained to the jury that Rodriguez's national origin "does not have to be the only reason, or even the main reason" that FedEx did not promote him, but it did have to be "one of the reasons which made a difference in determining whether or not to promote [him.]" Further, the instruction required the jury to find in favor of Rodriquez if it found that FedEx failed to promote him and that his national origin was one of the reasons for that failure. Rodriguez now claims that these instructions are contrary to our opinion reversing the summary judgment for FedEx on this claim and remanding it for trial. Rodriguez is mistaken. Our earlier opinion simply held that sufficient evidence had been presented to raise a jury question as to whether FedEx had acted with a discriminatory motive, and that FedEx had failed to demonstrate *at the summary judgment stage* that even if it had acted with discriminatory motive, it would nonetheless have taken the same action for legitimate reasons. The court's jury instructions comport with this legal framework even if they are not as specific as the ones Rodriguez proposed. After reviewing the trial record, we find no error in the district court's providing the jury with the instructions that we have repeatedly found to be correct as a matter of Michigan law.

We conclude that the issuance of a full written opinion by this court would serve no useful purpose. Accordingly, for the reasons stated in the district court's opinions, we **AFFIRM**.[1]

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[1] The National Lawyers Guild and the Michigan Association for Justice have each moved for permission to file amicus briefs in this appeal. The National Lawyers Guild urges us to create a model jury instruction for civil cases forbidding jurors from accessing the internet and the Michigan Association for Justice urges us to make an investigatory hearing mandatory any time a juror does access the internet. Because we, as a three-judge panel, are not empowered to make these proclamations and because our disposition of this appeal pretermits these arguments, we DENY the motions.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed September 17, 2008]

JOSE RODRIGUEZ,

Plaintiff,

vs.

FEDEX FREIGHT EAST, INC.,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION (#63)

Plaintiff Jose Rodriguez moves for reconsideration of this court's September 5, 2008 Order denying Rodriguez's motion for judgment notwithstanding the verdict or a new trial. Generally, and without restricting the court's discretion, the court will not

grant a motion for reconsideration that merely presents the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been mislead but also show that correcting the defect will result in a different disposition of the case. E.D. Mich. LR 7.1(g)(3).

Rodriguez has failed to demonstrate palpable error. Rodriguez's assertion that the court instructed the jurors not to "[use] the Internet for any purpose regarding this case" is simply false and, not surprisingly, unsupported by a citation to the record. Although Michigan Model Civil Jury Instruction 2.07 was offered as a *proposed* jury instruction, the instruction was not given. Attorney Martin's attestation that "Juror #4 told me that he learned all about the attorneys in the case from the Internet," and Juror #2's and Juror #5's attestations that Juror #4 "told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company," "stated he learned about the attorneys from the Internet," and "that he went on the Internet and read all about the attorneys in the case," are insufficient on their face to set aside the jury verdict or establish a prima facie case of impropriety. Marks v. Shell Oil Co., 895 F.2d 1128, 1130 (6th Cir. 1990); Hard v. Burlington Northern RR Co., 870 F.2d 1454, 1461 (9th Cir. 1989). Rodriguez's assertion that Juror #4 did more than learn about Counsel over the Internet is not supported by the proffered affidavits; the affidavits do not support an inference that Juror #4, for example, read a prior Sixth Circuit opinion related to this lawsuit. Indeed, Rodriguez's Counsel Attorney Rick Martin responded to FedEx's motion to strike this assertion by

candidly admitting that co-Counsel Attorney Glotta "*erroneously believed* that the 6th Circuit decision shown to him by plaintiff's counsel Rick Martin, was located on defense counsel Laura Brodeur's website." Plaintiff's August 18, 2008 Response to Motion to Strike, at 1 (emphasis added). Rodriguez's assertion that Juror #4 obtained specific information about the parties' Counsel as set forth in pages 3-9 of the motion for reconsideration is also unsupported by the affidavits. Rodriguez's argument that the court must grant an evidentiary hearing on this record is without merit, and merely presents the same issue already ruled upon by the court. E.D. Mich. LR 7.1(g)(3). The court makes clear that there is absolutely no evidence that Juror #4 accessed the prior Sixth Circuit opinion issued in this matter.

Attorney Martin does not in his more recent affidavit materially contest the circumstances by which he obtained information from Jurors #2, #4, and # 5. As previously set forth by the court:

> Rodriguez's Counsel [Mr. Martin] . . . advanced no reasonable grounds leading him to believe the jury verdict was subject to undue influence *before* he began questioning Jurors # 2, #4, and #5 without notice to this court or opposing Counsel. Simmons First National Bank, 88 F.R.D. [344, 347-48 (E.D. Ark. 1980) (citing inter alia Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973))]. Instead, Rodriguez's Counsel chose to question the jurors alone in the hallway after they left the jury room. Counsel had the opportunity to obtain a "perspective on the verdict" from the jurors in the presence of the court by joining the court in

> talking with the jurors in the jury room immediately after trial. Counsel's attestation that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggests improper questioning of the Jurors regarding matters that occurred during the course of deliberations and the Juror's mental processes in connection with the verdict. See Fed. R. Evid. 606(b). Counsel's post-verdict examination of the Jurors on behalf of his client, without notice to the court or opposing counsel, and without pre-existing grounds for reasonably believing the verdict was tainted, went beyond idle curiosity and was improper. Simmons First National Bank, 88 F.R.D. at 347-48.

September 5, 2008, at 7-8. Counsel's improper questioning of the jurors cannot be condoned. Simmons First National Bank, 88 F.R.D. at 347-48.

Absent a demonstration of palpable error, Rodriguez's motion for reconsideration is hereby DENIED.

SO ORDERED.

Dated: September 17, 2008

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

[*Certificate of Service omitted in printing this appendix*]

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed September 5, 2008]

JOSE RODRIGUEZ,

Plaintiff,

vs.

FEDEX FREIGHT EAST, INC.,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A MISTRIAL OR A NEW TRIAL (#48), AND DENYING DEFENDANT'S MOTION TO STRIKE REMARKS (#55)

Plaintiff Jose Rodriguez moves for relief from judgment, judgment as a matter of law[1], a mistrial, or a new trial following a June 27, 2008 jury verdict finding Rodriguez was not denied a promotion to supervisor by defendant FedEx Freight East, Inc. because of intentional discrimination based on national origin. Oral argument would not significantly aid the decisional process. Pursuant to E.D. Mich. Local R. 7.1(e)(2), it is ORDERED that the motion be resolved without oral argument.

The circumstances underlying this lawsuit have been set forth in prior opinions and orders, and will be reiterated herein only to the extent necessary to adjudicate the instant motions. See May 27, 2008 Order. Following remand from the Sixth Circuit, Rodriguez's remaining claim that he was denied a promotion to FedEx supervisor in violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), M.C.L. §§ 37.2101 et seq., was tried before a jury. The jury trial was conducted over five days, from June 23 through June 27, 2008, with the jury returning its verdict of no cause of action on June 27, 2008.

I. Plaintiff's Motion for Relief from Judgment, Judgment as Matter of Law, Mistrial, or New Trial

Rodriguez moves alternatively for relief from judgment under Rule 60(b)(6), judgment as a matter of law under Rule 50, a mistrial, or a new trial under Rule 59 premised on assertions of: (1) juror

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[1] Rodriguez refers to his motion in the state court vernacular "motion for judgment notwithstanding the verdict."

misconduct; (2) errors in the admission and exclusion of evidence; (3) errors in the denial of Rodriguez's proposed jury instructions; (4) defense counsel's misconduct; and (5) the evidence failing to support the jury verdict.

A motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) should be granted only under exceptional or extraordinary circumstances which are not addressed in Rule 60(b)(1-5). Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989). Accordingly, motions for relief from judgment under Rule 60(b)(6) are addressed in the district court's "especially broad" scope of discretion. Id.

A motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 is decided in the district court's discretion. Brown v. Village Green Mgt. Co., 342 F.3d 620, 626 (6th Cir. 2003). In a diversity case such as this, the district court applies the state law standard of review to motions for judgment as a matter of law challenging the sufficiency of the evidence necessary to support a jury verdict. Id; King v. Ford Motor Co., 209 F.3d 886, 893 (6th Cir. 2000). "Under Michigan law, a judgment as a matter of law may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence." Ridgway v. Ford Dealer Services, Inc., 114 F.3d 94, 97 (6th Cir. 1997) (internal quotations omitted). "A motion [for judgment as a matter of law] under Rule 50(b) is not allowed unless the movant sought relief on similar grounds under Rule 50(a), before the case was submitted to the jury." Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2617 n.5 (2008) (citing Fed. R. Civ. P. 50(b), Zacher v. Lee, 363 F.3d 70,

73-74 (1st Cir. 2004), and 9B C. Wright & Miller, Federal Practice and Procedure § 2537, 603-604 (3d ed.2008)).

Whether to grant a mistrial is also within the district court's discretion. Surles v. Greyhound Lines, Inc., 474 F.3d 288, 302 (6th Cir. 2007). A district court may grant a mistrial on finding that a reasonable probability exists that the jury verdict was influenced by improper conduct. Id.

A motion for a new trial under Federal Rule of Civil Procedure 59 is likewise directed to the district court's discretion. Denhof v. City of Grand Rapids, 494 F.3d 534, 543 (6th Cir. 2007). A motion for a new trial may be premised on grounds that include the verdict is against the weight of the evidence or the movant was not given a fair trial. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940). Even in diversity cases, the district court applies federal law in deciding a motion for a new trial. Ridgway, 114 F.3d at 98. The court should deny a motion for a new trial if the verdict was reasonably reached. Id.

A. Asserted Juror Misconduct

Rodriguez moves for an evidentiary hearing and a new trial based on the alleged misconduct of Juror #4, as attested to by Rodriguez's Counsel Attorney D. Rick Martin, Juror #2, and Juror #5. Attorney Martin attests:

> 1. Following the verdict, I spoke with the jurors to thank them for their jury service and obtain some perspective on the verdict.

2. Juror #4 was the most outspoken in explaining and defending the verdict.

3. Juror #4 told me that he learned all about the attorneys in the case from the Internet.

4. Juror #4 stated that he went online and read all about our background, education, and areas of practice. He stated that he knew that I was a former president in the UAW. Juror #4 also stated that he knew all about FedEx's attorney, her background, and the lawfirm she is with.

Juror #2 attests:

1. I was Juror #2, one of eight jurors in the trial of Jose Rodriguez v. FedEx Freight East, case No. 08-cv-10637. The case was tried in the U.S. District Court for the Eastern District of Michigan. The trial began on June 23, 2008 and ended on June 27, 2008.

2. On June 27, 2008 the Judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.

3. It was decided that one juror would go and bring back lunch for the rest of us. However, five jurors decided to go get the lunch. Among the five jurors was Juror #4. He had told us that he knows all about the attorneys for Mr. Rodriguez and the attorney for the company. He stated he learned about the attorneys from the Internet.

4. When the five jurors returned, Juror #4 began arguing in favor of FedEx. Three jurors who left with him to bring back our lunch immediately agreed with Juror #4.

Juror #5 attests:

1. I was Juror number 5, one of eight jurors in the trial of Jose Rodriguez v. FedEx Freight East, Case No. 08-cv-10637. The case was tried in the United States District Court for the Eastern District of Michigan. The trial began on June 23, 2008 and ended on June 27, 2008.

2. On June 27, 2008 the judge told us we could have lunch before beginning deliberations or we could begin deliberations after lunch.

3. Myself, Juror #4, Juror #1, Juror #7, and Juror #8 went out to get lunch. Before we began deliberations Juror #4 told us that he went on the Internet and read all about the attorneys in the case.

4. Juror #4 led the discussions in deliberations against finding in favor of Mr. Rodriguez and for finding in favor of FedEx.

Federal Rule of Evidence 606(b) provides:

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other

> juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Rule 606(b) itself "makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity." 1972 Advisory Note to Fed. R. Evid. 606(b).

"[W]hether or not extraneous influences have so prejudiced jury consideration of the issues in the jury trial as to warrant reversal for new trial is an issue to be decided by the standards of federal law," and is a matter to be decided in the district court's discretion. Gault v. Poor Sisters of St. Frances Seraph of the Perpetual Adoration, Inc., 375 F.2d 539, 549 (6th Cir. 1967). To be entitled to an evidentiary hearing on the issue of undue influence, the party seeking the hearing must allege the specific conduct by a juror that resulted in the undue influence. Marks v. Shell Oil Co., 895 F.2d 1128, 1131 (6th Cir 1990).

> Looking only at affidavits and testimony admissible under Rule 606(b), the court must decide whether an evidentiary hearing is

> required to determine whether a new trial is necessary. An evidentiary hearing is justified only when these materials are sufficient on their face to require setting aside the verdict. Where a losing party in a civil case seeks to impeach a jury verdict, it must be shown by a preponderance of the evidence that the outcome would have been different. Unless the affidavits on their face support this conclusion, no evidentiary hearing is required. . . . .

Hard v. Burlington Northern RR Co., 870 F.2d 1454, 1461 (9th Cir. 1989). See also Marks, 895 F.2d at 1130 (reasoning that an evidentiary hearing must be granted "when the challenging party alleges facts that establish a prima facie case of impropriety"). "On a motion for an evidentiary hearing, any doubt must be resolved in favor of granting the motion, if the movant articulates a particular fact that would deny a fair trial." Marks, 895 F.2d at 1130.

In assessing Rule 606(b) affidavits, courts should also examine the circumstances under which the affidavits were obtained.

> Even though this is a civil case, the ABA's Standards Relating to the Administration of Criminal Justice are pertinent. They suggest notice to opposing counsel and the court:
>
> After verdict, the lawyer should not make comments concerning an adverse verdict or ask questions of a juror for the purpose of harassing or embarrassing the jury in any way which will tend to influence judgments in future jury service. If the lawyer has reasonable ground to

believe that the verdict may be subject to legal challenge, he may properly, if no statute or rule prohibits such course, communicate with jurors for that limited purpose, upon notice to opposing counsel and the court.

Before interviewing the jurors in this case, counsel did not give notice either to the court or opposing counsel. Inquiry was directed to matters clearly precluded by Rule 606(b). In Rakes v. U.S., 169 F.2d 739, 745-6, (4 Cir.), cert denied, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380 (1948), the Fourth Circuit condemned the practice in no uncertain terms:

> He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching and pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is up to the courts to protect jurors from it.

Simmons First National Bank v. Ford Motor Co., 88 F.R.D. 344, 347-48 (E.D. Ark. 1980) (citing inter alia Stephens v. City of Dayton, 474 F.2d 997 (6th Cir. 1973)). See also Munafo v. Metropolitan Transportation Auth., 381 F.3d 99, 107-08 (2nd Cir. 2004) (recognizing that courts may evaluate the circumstances under which Rule 606(b) affidavits were obtained in assessing their evidentiary weight).

The specific improper conduct set forth in the proffered Rule 606(b) affidavits — that Juror #4 told

his fellow jurors prior to deliberations that he knew all about the parties' attorneys from information he had read on the Internet — is insufficient on its face to set aside the verdict on a finding that the outcome of the trial would have been different had Juror #4 not engaged in the conduct. Hard, 870 F.2d at 1461. Juror #4 is not alleged to have told the other jurors the substance of the information he learned about the attorneys. Counsel themselves gave descriptions of their backgrounds to the jurors during the course of trial. It was readily apparent that Mr. Martin was representing an employee alleging national origin discrimination against a large corporation represented by Ms. Brodeur. Any undue bias a particular juror held against attorneys who represent minority employees or large corporations was the proper subject of voir dire. See McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981). Rodriguez's argument that the jury reached its verdict by relying on an unjust bias against Rodriguez's Counsel arising from Juror #4's pre-deliberation statements that he learned all about the attorneys from the Internet is conjecture. See McCoy, 151 F.3d at 659 n.9 ("In all cases, the allegations in the moving papers must be sufficiently specific, detailed, and nonconjectural so that fact issues are raised.").

Rodriguez's argument that Juror #4 violated the court's preliminary jury instructions is erroneously premised on Michigan Model Civil Jury Instruction 2.07, *an instruction that was not given to the jury*. Juror #4 was not instructed, as Rodriguez claims, not to "[use] the Internet for any purpose regarding this case." See Plaintiff's July 7, 2008 Motion Brief,¶ 3, at 2; Plaintiff's July 31, 2008 Reply Brief, at 1. In any event, Juror #4's conduct on its face does not establish

a prima facie case of impropriety which denied Rodriguez a fair trial. Hard, 870 F.2d at 1461; Marks, 895 F.2d at 1130. Unlike McCoy and Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998), relied upon by Rodriguez, the specific conduct set forth in the proffered Rule 606(b) affidavits does not include deliberate concealment or purposefully incorrect responses made to the court during voir dire indicating an improper bias. Compare McCoy, 151 F.3d at 658-59; Dyer, 151 F.3d at 975-976.

Rodriguez's Counsel has advanced no reasonable grounds leading him to believe the jury verdict was subject to undue influence *before* he began questioning Jurors # 2, #4, and #5 without notice to this court or opposing Counsel. Simmons First National Bank, 88 F.R.D. at 347-48. Instead, Rodriguez's Counsel chose to question the jurors alone in the hallway after they left the jury room. Counsel had the opportunity to obtain a "perspective on the verdict" from the jurors in the presence of the court by joining the court in talking with the jurors in the jury room immediately after trial. Counsel's attestation that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggests improper questioning of the Jurors regarding matters that occurred during the course of deliberations and the Juror's mental processes in connection with the verdict. See Fed. R. Evid. 606(b). Counsel's post-verdict examination of the Jurors on behalf of his client, without notice to the court or opposing counsel, and without pre-existing grounds for reasonably believing the verdict was tainted, went beyond idle curiosity and was improper. Simmons First National Bank, 88 F.R.D. at 347-48.

Upon assessing the proffered Rule 606(b) affidavits and the circumstances under which they were obtained, Rodriguez is not entitled to an evidentiary hearing or a new trial. Gault, 375 F.2d at 549; Hard, 870 F.2d at 1461; Marks, 895 F.2d at 1130-1131. There are no exceptional or extraordinary circumstances warranting relief from the verdict under Rule 60(b)(6). Hopper, 867 F.2d at 294. Rodriguez is not entitled to a mistrial or new trial on the grounds that the jury verdict was probably influenced by improper conduct. Surles, 474 F.3d at 302; Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98.

B. Evidentiary Rulings

Rodriguez argues he was denied a fair trial by the admission of evidence in violation of Federal Rule of Evidence 803(6) governing records of regularly conducted activities. Rodriguez argues the court erred in admitting into evidence: (1) a July 15, 2002 letter written by FedEx Regional Human Resources Manager Rodney Adkinson recommending the termination of FedEx Customer Service Manager John McKibbon, and an attached "survey"; (2) the employment applications of Don Spinney and Michael Burdick; (3) a list of supervisor applicants who completed the Leadership Apprentice Course (LAC) after Rodriguez resigned; and (4) certain internal FedEx e-mails indicating Rodriguez was not completing LAC requirements. Rodriguez also argues the court erred in admitting only a redacted copy of Rodriguez's resignation letter.

Whether to admit or exclude evidence is in the district court's discretion. Williams v. General Motors Corp., 18 Fed. Appx. 342, 344-345 (6th Cir. Aug. 24

2001) (citing Muzquiz v. W.A. Foote Mem. Hosp., Inc., 70 F.3d 422, 428 (6th Cir. 1995)). For a witness to lay a proper foundation for the admission of evidence under Rule 803(6), all that is required is that the witness is familiar with the record keeping system. Dyno Construction Co. v. McWane, Inc., 198 F.3d 567, 575-576 (6th Cir. 1999). In reviewing a motion for a new trial premised on an erroneous admission of evidence, this court will "view the evidence in the light most favorable to its proponent, giving the evidence its maximum reasonable probative value and its minimum reasonable prejudicial value." Williams, 18 Fed. Appx. at 345 (quoting Muzquiz, 70 F.3d at 428). Even if a trial court abuses its discretion in admitting evidence, a new trial should not be granted unless a "substantial right of the party is affected." Id. (citing Fed. R. Evid. 103(a), Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 677 (6th Cir. 2000), and Morganroth & Morganroth v. DeLorean, 123 F.3d 374, 382 (6th Cir. 1997)). An error in the admission or exclusion of evidence does not warrant a new trial unless "the evidence would have caused a different outcome at trial." Tompkin v. Phillip Morris USA, Inc., 362 F.3d 882, 891 (6th Cir. 2004) (quoting Morales v. Am. Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998)).

i. July 15, 2002 Letter and Survey

Adkinson himself laid a proper foundation for the July 15, 2002 letter and survey. Dyno Construction, 198 F.3d at 575-576. The fact that McKibbon was not given a copy of the internal letter and survey before he resigned is of no demonstrated consequence. Rodriguez's assertion that the documents lacked "trustworthiness" is not well taken. Rodriguez's

demand to proceed immediately to trial on remand, without the benefit of discovery initially recommended and ordered by the court, explains why the letter and survey were not previously disclosed. Rodriguez's reliance on Michigan law to support his claim of error in the admission of evidence under Federal Rule of Evidence 803(6) is without merit. See Legg v. Chopra, 286 F.3d 286, 289 (6th Cir. 2002) (recognizing that "the Federal Rules of Evidence, rather than state evidentiary laws, are held to apply in federal diversity proceedings."). Viewing the July 15, 2002 letter and survey in the proper light, the evidence was properly admitted to challenge the credibility of McKibbon's testimony. Williams, 18 Fed. Appx. at 345.

ii. Employment Applications of Spinney and Burdick

Rodriguez's argument that the job applications of Spinney and Burdick lacked trustworthiness because job applicants often lie on their applications is wholly without merit. Rodriguez was free to make this argument to the jury. The applications were properly admitted under the business records exception to hearsay under Rule 803(6). Williams, 18 Fed. Appx. at 344-345.

iii. List of LAC Participants and E-Mails

Rodriguez's arguments that the list of LAC participants and e-mails indicating Rodriguez was not participating in the LAC were, again, not trustworthy, is without merit. Adkinson and FedEx People Development Coordinator Wendy Robinson laid a proper foundation for the admission of these documents under Rule 803(6). Dyno Construction, 198 F.3d at 575-576. Rodriguez's reliance on Michigan case

law finding certain police reports were inadmissable is misplaced. Legg, 286 F.3d at 289. Rodriguez's assertion that the documents were generated in anticipation of litigation is simply not supported by the record. It was for the jury to assign the appropriate evidentiary weight to the these documents. Properly viewed, the documents' probative value outweighed any unreasonable prejudicial effect on Rodriguez's claim. Williams, 18 Fed. Appx. at 345.

iv. Rodriguez' Resignation Letter

Rodriguez's argument that the admission of his redacted resignation letter affected a "substantial right" is conclusionary. Rodriguez's claim of constructive discharge was dismissed by this court, and the dismissal was affirmed on appeal. The limited redaction properly eliminated juror confusion and an implicit reinstatement of the dismissed constructive discharge claim. Rodriguez freely testified to his belief that he was subjected to unlawful discrimination throughout his tenure at FedEx. The court did not err in admitting a redacted copy of Rodriguez's resignation letter to the jury as probative of Rodriguez's remaining claim that he was denied a promotion to supervisor based on his Hispanic national origin. Williams, 18 Fed. Appx. at 344-345.

Rodriguez has failed to demonstrate that the court abused its discretion in the admission or exclusion of evidence at trial. Id. Any change in the evidentiary rulings challenged by Rodriguez would not have caused a different outcome in the verdict. Tompkin, 362 F.3d at 891. The rulings made by the court did not involve exceptional or extraordinary circumstances warranting relief under Rule 60(b)(6). Hopper, 867

F.2d at 294. Rodriguez did not move for a directed verdict under Rule 50(a) on the basis of the improper admission or exclusion of evidence, precluding relief under Rule 50(b) on similar grounds. Exxon Shipping, 128 S.Ct. at 2617 n.5. Rodriguez is not entitled to a mistrial in the absence of a reasonable probability that the verdict was improperly influenced by the erroneous admission or exclusion of evidence. Surles, 474 F.3d at 302. Rodriguez is not entitled to a new trial under Rule 59 based on an erroneous admission or exclusion of evidence. Tompkin, 362 F.3d at 891; Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98.

C. Rodriguez's Proposed Jury Instructions

Rodriguez argues the court erred by failing to give his proposed jury instruction No. 1 relative to "mixed motive" cases, failing to give his proposed jury instruction No. 2. that "Discrimination based upon Plaintiff's Hispanic accent, [sic] includes discrimination based on national origin," and failing to give proposed jury instruction No. 6 directing the jury to find that Rodriguez was not required to apply for supervisor positions at all of the FedEx terminals over which Adkinson had control.

Whether to give a proposed jury instruction is within the district court's discretion. Hisrich v. Volvo Cars of North America, Inc., 226 F.3d 445, 449 (6th Cir. 2000). State law determines the substance of jury instructions in a diversity case, while federal procedural law governs issues regarding the propriety of the instructions. Id. A jury verdict should be reversed only if the jury instructions viewed as a whole were confusing, misleading, or prejudicial. Id. A district court sitting in diversity has no duty to give

additional requested instructions if the state's standard jury instructions given to the jury, viewed as a whole, fairly and accurately described applicable state law. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266, 269 (6th Cir. 1985).

The state law claim before the jury was whether FedEx violated Michigan's ELCRA by denying Rodriguez a promotion to supervisor based on Rodriguez's national origin. The court instructed the jury using Michigan's standard civil jury instructions, including Michigan's definition of employment discrimination found at Michigan Model Civil Jury Instruction 105.02 (Jury Instruction No. 20), and the burden of proof to be applied in Michigan employment discrimination cases found at Michigan Model Civil Jury Instruction 105.04 (Jury Instruction No. 22):

Jury Instruction No. 20
Employment Discrimination – Definition

The plaintiff must prove that he was discriminated against because of his national origin.

The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for plaintiff's failure to be promoted was his national origin. National origin does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to promote the plaintiff.

* * *

Jury Instruction No. 22
Employment Discrimination (Disparate Treatment) – Burden of Proof

Plaintiff has the burden of proving that:

(a) defendant failed to promote the plaintiff; and

(b) national origin was one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Your verdict will be for the plaintiff if you find that defendant failed to promote the plaintiff, and that national origin was one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Your verdict will be for the defendant if you find that the defendant did not fail to promote the plaintiff. Your verdict will also be for the defendant if you find that defendant did fail to promote the plaintiff, but that national origin was not one of the motives or reasons which made a difference in determining to fail to promote the plaintiff.

Rodriguez's proposed jury instruction No. 1 does not fairly and accurately describe Michigan law in its attempt to shift the burden of proof to the employer FedEx:

PLAINTIFF'S PROPOSED SPECIAL INSTRUCTION No. 1

> Your verdict will be for Jose Rodriguez if you find that he demonstrated by a preponderance of the evidence that his Hispanic accent-national origin, was a motivating factor in FedEx's decision to not consider Rodriguez for a promotion to a supervisor position, even if other factors also motivated Adkinson's decision. However, if you find that FedEx's treatment of Rodriguez was motivated by both his Hispanic accent-national origin, and lawful reasons, you must decide whether he is entitled to damages. Plaintiff is entitled to damages, unless Fed Ex proves by a preponderance of the evidence that FedEx's [sic] would not have considered Plaintiff for a promotion even if Plaintiff's accent played no role in FedEx's decision. Remember that Plaintiff is not obligated to show that FedEx's legitimate reasons played no role in the decision to not consider Plaintiff for a promotion, nor does Plaintiff need to show that the prohibited factor was the sole principle [sic] reason or true reason.
>
> Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); Barnes v. City of Detroit, 401 F.3d 729 (6th Cir. 2005).

(emphasis added). Desert Palace and Barnes were each federal Title VII cases out of, respectively, the District of Nevada and the Southern District of Ohio. Desert Palace, 539 U.S. at 96; Barnes, 401 F.3d at 733. Neither Desert Palace nor Barnes were diversity actions applying Michigan law. The Sixth Circuit has

recognized that Michigan has rejected the use of a "mixed-motive" burden shifting jury instruction:

> The Michigan Supreme Court Committee on Jury Instructions, in its drafting of [Michigan Standard Jury Instruction 2d § 105.04, now Michigan Model Civil Jury Instruction 105.04], considered and "deliberately eschewed" the McDonnell Douglas shifting-burdens formulation, stating specifically that such an instruction would "'add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.' ..." II Michigan Standard Jury Instruction 2d, Employment Discrimination Introduction 17-5 (citing Loeb v. Textron, 600 F.2d 1003, 1016 (1st Cir. 1979)). We agree with the Committee on Jury Instructions. Rather than confuse the jurors with legal definitions of the burdens of proof, persuasion, and production and how they shift under McDonnell Douglas, we find that the above [Michigan standard jury] instruction was a clear and preferable statement of the law.

Lewis v. Sears, Roebuck & Co., 845 F.2d 624, 634 (6th Cir. 1988).

Even in Title VII "mixed-motive" cases, district courts are not required to give a "mixed-motive" instruction as proposed by Rodriguez:

> In order for an instruction to be proper under 42 U.S.C. § 2000e-2(m), a plaintiff need only

present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Desert Palace, Inc. v. Costa, 539 U.S. 90, 101-02, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003)(citing 42 U.S.C. § 2000e2(m)). In Desert Palace, the Court upheld a district court's decision to instruct the jury in a Title VII sex discrimination case, where the district court used the same language as the district court used in this case. Desert Palace, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84.

A jury instruction will not automatically be erroneous simply because it does not precisely follow the legal niceties of McDonnell Douglas, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). See Brown v. Packaging Corp. of Am., 338 F.3d 586, 591 (6th Cir.2003); see also Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 571 (6th Cir.2003)(stating that criticism of an employee's performance, even if true, which is linked to stereotypes associated with a plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis).

In this case, Barnes presented sufficient evidence for a reasonable jury to conclude that sex was a motivating factor for the City's employment decision. See § II.A.1, supra. A district court is not bound by the McDonnell Douglas analysis when giving jury instructions.

> Brown, 338 F.3d at 591. As the district court did in this case, courts may give mixed-motive jury instructions where the plaintiff has presented enough evidence for a reasonable jury to find by a preponderance of the evidence that sex was a motivating factor in the decision to demote plaintiff. Desert Palace, 539 U.S. at 96-97, 123 S.Ct. 2148, 156 L.Ed.2d 84. The district court instructed the jury using a mixed motive instruction that tracked the language in Desert Palace. After reviewing the mixed-motive instruction and the jury instructions as a whole, it is clear that the mixed-motive instruction was proper under Desert Palace. Accordingly, we cannot say that the instructions were confusing, misleading and prejudicial and we hold that the district court did not err by giving a mixed-motive instruction to the jury.

Barnes, 401 F.3d at 740 (emphasis added). In a recent case involving both Michigan ELCRA claims and age discrimination claims under the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., a panel of the Sixth Circuit explained:

> The direct/circumstantial distinction need not affect the further proceedings on remand. See Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570-77 (6th Cir.2003) (en banc) (offering analysis under both direct-evidence and circumstantial-evidence standards and ultimately remanding age-discrimination case to the district court for further proceedings). Although a district court may find it helpful to instruct a jury on the McDonnell Douglas burden-switching framework in an appropriate

> circumstantial-evidence case, there is no requirement that it do so in all cases. See Brown v. Packaging Corp. of Am., 338 F.3d 586, 595-99 (6th Cir.2003); Chonich v. Wayne County Cmty. Coll., 874 F.2d 359, 366 (6th Cir.1989) (McDonnell Douglas instruction "has been approved but is not absolutely required by this court"). When a discrimination case proceeds to trial, the focus is on the ultimate question of discrimination, rather than the burden-switching framework, regardless of whether a plaintiff seeks to prove his case through direct evidence or circumstantial evidence. We noted as much by holding that when reviewing a jury verdict in a discrimination case, our "focus [is] on the ultimate question of discrimination rather than on whether a plaintiff made out a prima facie case." Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 317 n. 7 (6th Cir.2007) (quoting Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir.2005)). . . . .

Blair v. Henry Filters, Inc., 505 F.3d 517, 526 n.9 (6th Cir. 2007) (emphasis added). See also White v. Baxter Healthcare Corp., 533 F.3d 381 (6th Cir. 2008) (quoting Desert Palace, 539 U.S. at 101, and reasoning that in Title VII "mixed-motive" cases filed under 42 U.S.C. § 2000e-2(m), "[t]he only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in such cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude by a preponderance of the evidence that 'race, color, religion, sex, or national origin was a motivating factor

for'" the defendant's adverse employment decision.") (emphasis added).

Michigan law controlled the substance of the jury instructions to be given the jury in adjudicating Rodriguez's ELCRA claim of national origin discrimination. Hisrich, 226 F.3d at 449. The Michigan Model Civil Jury Instructions given to the jury regarding the definition of actionable national origin discrimination and Rodriguez's burden of proof fairly and accurately described Michigan law. Rhea, 767 F.2d at 269. Rodriguez's proposed jury instruction No. 1 does not accurately describe Michigan law, and would have "confuse[d] the jurors with legal definitions of the burdens of proof, persuasion, and production." Lewis, 845 F.2d at 634. The court did not abuse its discretion or otherwise err in refusing to give Rodriguez's proposed jury instruction No. 1. Hisrich, 226 F.3d at 449; Rhea, 767 F.2d at 269.

Rodriguez's remaining arguments that the court erred by failing to give his proposed jury instructions that discrimination based upon a Hispanic accent includes discrimination based on national origin, and by failing to give his proposed jury instruction that Rodriguez was not required to apply for supervisor positions at all of the FedEx terminals supervised by Adkinson, are without merit. Rodriguez was permitted to, and did, make these arguments to the jury as to the "ultimate issue" of discrimination. Blair, 505 F.3d at 526 n.9. Rodriguez has not shown that the jury instructions given, as a whole, were confusing, misleading, or prejudicial on this record. Hisrich, 226 F.3d at 449.

Rodriguez has failed to demonstrate that the court abused its discretion in refusing to give his proposed jury instructions. Id. Rodriguez is not entitled to relief under Rule 60(b)(6) premised on erroneous jury instructions. Hopper, 867 F.2d at 294. Rodriguez is not entitled to a mistrial or a new trial based on the instructions given to the jury. Surles, 474 F.3d at 302; Denhof, 494 F.3d at 543.

D. Asserted Defense Counsel Misconduct

Rodriguez argues that he is entitled to a new trial because defense Counsel denied in closing argument to the jury that Adkinson was a racist, and permitted FedEx witness Sammy Reid to "lie" as to when Reid first discovered that Rodriguez had filed a legal action. Whether misconduct at a trial was such that a fair or impartial verdict could not be reached is to be determined by the district court in its discretion. City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 756 (6th Cir. 1980). If there is a reasonable probability that counsel's questions or remarks raised unrelated subjects and improperly influenced the verdict, the verdict should be set aside. Id.

Defense Counsel's argument that Adkinson was not a racist is related to the subject of this lawsuit involving a claim that Adkinson, acting on discriminatory animus, refused to promote Rodriguez because of Rodriguez's Hispanic national origin. Defense Counsel was responding to Rodriguez's Counsel's broad closing and energetic argument. Rodriguez's assertion that Defense Counsel permitted Reid to "lie" is inflammatory and inaccurate. In any event, the jury was permitted to believe either Reid or Ravenelle regarding when Reid first learned that

Rodriguez was pursuing a legal claim. Rodriguez's arguments that defense Counsel engaged in misconduct which improperly influenced the verdict is baseless. There is no reasonable probability that defense Counsel improperly influenced the jury verdict. Kiewit Sons' Co., 624 F.2d at 756.

E. Sufficiency of the Evidence

Rodriguez argues the evidence introduced at trial does not support the verdict, and that the verdict is against the great weight of the evidence. Rodriguez points to what he terms "admissions" by Adkinson, and "lies" by Reid and Ravenelle. Rodriguez makes no citation to the record.

At best, Rodriguez's arguments are conclusionary. Rodriguez has not shown that exceptional or extraordinary circumstances related to the evidentiary record warrant relief from judgment under Rule 60(b)(6). Hopper, 867 F.2d at 294. Rodriguez did not move for judgment as a matter of law under Rule 50(a), and he is thus precluded from seeking judgment as a matter of law based on the sufficiency of evidence under Rule 50(b). Exxon Shipping, 128 S.Ct. at 2617 n.5. Alternatively, the motion is without merit as reasonable jurors could have drawn differing conclusions from the entirety of the record evidence. Brown, 342 F.3d at 626; Ridgway, 114 F.3d at 97. Rodriguez's assertions of admissions and lies do not support granting a mistrial. Suries, 474 F.3d at 302. When a motion for a new trial challenges the weight of the evidence, the trial court must accept the jury's verdict if, as here, the verdict reasonably could have been reached. Denhof, 494 F.3d at 543; Ridgway, 114 F.3d at 98. It was for the jury to consider the

credibility of the witnesses and the conflicting evidence, and their verdict could have reasonably been reached on this record notwithstanding Rodriguez's conclusionary assertions of "admissions" and "lies."

Consistent with the reasoning set forth above in this Section I, Rodriguez's motion for relief from judgment, judgment as a matter of law, a mistrial, or a new trial will be denied.

II. Defendant's Motion to Strike Remarks

FedEx moves to strike allegedly inappropriate and offensive remarks from Rodriguez's motion, particularly, an allegedly false representation that defense Counsel's website contained the Sixth Circuit's June 27, 2007 opinion In re Rodriguez, 487 F.3d 1001 (6th Cir. 2007), which remanded Rodriguez's failure to promote claim. Rodriguez has responded that Attorney Glotta "erroneously believed that the 6th Circuit decision shown to him by plaintiff's counsel Rick Martin, was located on defense counsel Laura Brodeur's website." Plaintiff's August 18, 2008 Response, at 1. The court noted the correction in considering Rodriguez's motion. Rodriguez's assertion that defense Counsel permitted Reid to "lie" was also considered by the court, and given its appropriate weight. The court declines to strike any remarks from Rodriguez's briefs in deference to a fully developed record.

III. Conclusion

For the reasons set forth above, Rodriguez's motion for relief from judgment, judgment as a matter of law, a mistrial, or a new trial, and request for an

evidentiary hearing, are hereby DENIED. FedEx's motion to strike is hereby DENIED.

SO ORDERED.

Dated: September 5, 2008

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bkrptcy No. 04-47510-PJS
Adversary No. 05-5149-PJS
HON. PHILLIP J. SHEFFERLY
Case No. 08-CV-10637
HON. GEORGE CARAM STEEH

[Filed June 27, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff,	)
	)
vs.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant.	)
	)

JUDGMENT FOR DEFENDANT
Jury Verdict

This action came before the court for a trial by jury. The issues have been duly tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing, the action be dismissed on the merits, and the defendant recover of the plaintiff all applicable costs of this action.

Dated at Detroit, Michigan, June 27, 2008.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marcia Beauchemin
DEPUTY COURT CLERK

[*Certificate of Service omitted in printing this appendix*]

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2272

[Filed January 5, 2011]

IN RE: JOSE ANTONIO RODRIGUEZ,

Debtor.

STUART GOLD, TRUSTEE FOR, THE ESTATE OF JOSE ANTONIO RODRIGUEZ,

Plaintiff-Appellant,

v.

FEDEX FREIGHT EAST, INC.,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER, Chief Judge; SUTTON and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of

this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

RECORD
AND
BRIEFS

(2)

Supreme Court, U.S.
FILED
MAY 19 2011
OFFICE OF THE CLERK

No. 10-1226

In the Supreme Court of the United States

JOSE ANTONIO RODRIGUEZ,
Petitioner,

v.

FEDEX FREIGHT EAST, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Court of Appeal's Opinion affirming the District Court does not conflict with a decision of this Court or a Court of Appeals.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Court of Appeal's Opinion affirming the District Court does not implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE PURSUANT TO SUPREME COURT RULE 29.6

Respondent FedEx Freight East, Incorporated is a subsidiary/affiliate of FedEx Corporation.

FedEx Corporation is a publicly owned corporation, not a party to the appeal, which has a financial interest in the outcome of the appeal.

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I. INTRODUCTION

The present diversity case involves a one-count state law discrimination claim for failure to promote, where, by his own admission, Petitioner purportedly lost less than $5,000 in economic damages. (Resp. Appx. 7b-10b, 14b-15b). The matter was tried before a jury after the district court provided customary introductory instructions, including a general prohibition against investigating the facts of the case, as well as substantive instructions based on the Michigan Model Jury Instructions. The case involved no federal questions or issues whatsoever. While Petitioner now argues that the district court should have given a specific instruction prohibiting internet use by jurors, no model state or federal court instruction, nor any requirement to provide such instruction, existed at the time of trial. The fact that one juror purportedly read about the lawyers on the internet also does not warrant review by this Court. Nor does the fact that the district court denied an evidentiary hearing regarding Juror #4's alleged conduct warrant such review.

Petitioner provides no compelling reason for this Court to grant his Petition for Writ of Certiorari ("Petition") because there is none. There is no conflict between the Circuits, nor has the Sixth Circuit Court of Appeals ("Court of Appeals") decided an important question of federal law that conflicts with, or which has not been settled by, this Court. While the inapposite and *post-hoc* cases and commentary from various journals and news articles cited by Petitioner regarding potential juror internet use may serve useful for a model rules committee, they provide no legal

basis for review by this Court.[1] Accordingly, the Petition should be denied.

II. STATEMENT OF THE CASE/ CORRECTION OF PERTINENT FACTS

On December 2, 2003, Petitioner filed a multi-count Complaint alleging exclusively state-laws claims against Respondent in a Michigan circuit court, which was removed on diversity grounds. (District Court Case No. 2:04-cv-70021, R. 1, Notice of Removal with attached Complaint). Petitioner subsequently filed for bankruptcy and this case became part of the bankruptcy estate. (District Court Case No. 2:04-cv-70021, R. 24, Referral Order). On December 1, 2005, the bankruptcy court granted Respondent summary judgment on all counts. (District Court Case No. 2:08-cv-10637, R. 2, Objections to Bankruptcy Court's Order After Removal, Ex. A, Initial Bankruptcy Court Opinion). On May 30, 2006, the district court affirmed the bankruptcy court. (*Id.*, Ex. B, Order Affirming Bankruptcy Court).

In July 2006, Petitioner filed his first appeal. On June 27, 2007, the Court of Appeals issued its opinion affirming the district court on all counts but one. It remanded the matter solely to determine whether Respondent would have refused to promote Petitioner even absent an allegedly discriminatory comment regarding his accent. *In Re Rodriguez v. FedEx Freight East, Inc.*, 487 F.3d 1001, 1009-10 (6th Cir. 2007).

---

[1] All of the journal and internet articles, and internet-related cases, post-date the trial in this case.

On June 23, 2008, the district court began a five-day jury trial as to Petitioner's failure to promote claim on which he was limited to approximately $3,500.00 to $5,000.00 in economic damages.[2] (Resp. Appx. 7b-10b, 14b-15b). Prior to trial, the district court specifically informed the parties (both on the record and in chambers) that it would not read all of their proposed instructions and statements. (R. 68, Trial Trans. Vol. 1A, p. 5:19-6:4). After impaneling the jury, the district court provided preliminary jury instructions. It did not "refuse" to give the parties' proposed instruction regarding use of the internet, as Petitioner suggests, but instead read the following alternative charge:

> Secondly, do not read or listen to anything about the case in any way. . . . Third, do not try to do any research or make any investigation about the case on your own. . . .
>
> (Resp. Appx. 3b (emphasis supplied)); *see also* Pet. Brf. p. 14.

The instruction, as provided, adequately addressed the parties' concerns about researching the case – on the internet or otherwise. At no time did Petitioner object to the instruction that was given, nor to the fact that the parties' proposed instruction was not provided. Petitioner's claim that the district court "did

---

[2] The Court of Appeals affirmed the district court's finding that Petitioner had voluntarily resigned from Respondent and was not constructively discharged. Thus, he was only entitled to recover minimal economic damages (i.e., from the date of the alleged promotion until the date he resigned). *In Re Rodriguez*, 487 F.3d at 1009.

not even give the parties an opportunity to object," pursuant to Fed.R. Civ. P. 51(b)(1)(2) or otherwise, is patently false. (Pet. Brf. pp. 3, 14). Petitioner had ample opportunity to object and, in fact, made multiple objections when the district court refused to read several of his other proposed instructions. (R. 75, Trial Trans. Vol. 5B).

At the close of proofs, the district court instructed the jury as to what "evidence" it could consider in reaching a verdict:

> The evidence that you are to consider consists of testimony of witnesses and exhibits that are offered and received. . . . ***The lawyers' statements and arguments are not evidence.*** They are only meant to help you understand the evidence and each side's legal theories.
>
> * * *
>
> You have a right to consider all of the evidence in light of your own general knowledge and experience in the affairs of life, and to take into account whether any particular evidence that seems reasonable and probable. ***However, if you have personal knowledge of any particular fact in this case, such knowledge should not be used as evidence.***

[R. 75, Trial Trans. Vol. 5B-1, Jury Charge, pp. 12:16-14:6]. The district court further instructed the jury to disregard anything heard outside of the courtroom and to decide the case solely on evidence presented in court. (R. 68, Trial Trans. Vol. 1A, p. 53:17-20).

At closing, Petitioner's counsel stated he was a former UAW member. (R.68, Trial Trans. Vol. 5A). He also made repeated references to Respondent having the funds to hire a large law firm, and that lead counsel worked for a large defense firm. (Resp. Appx. 12b-22b). In response, Respondent's counsel traded biographies by interjecting one comment about her background. Petitioner did not object.

On June 27, 2008, the jury no-caused Petitioner entering a verdict in Respondent's favor. (R. 45, Verdict). The district court polled the jury after the verdict and discharged the jurors. (R. 75, Trial Trans. Vol. 5B-1, Verdict, pp. 30:23-32:10). Petitioner never requested further inquiry, nor was there cause to do so. Yet, Petitioner's counsel approached jurors before they could leave the courthouse. (R. 63, Rodriguez's Motion for Reconsideration, Ex. 1, Martin Aff., p. 2). He then engaged in *ex parte* and wholly inappropriate communications. (R. 48, Motion for New Trial, Ex. 1, Martin Aff., pp. 1-2). Absent any notice to the district court or opposing counsel, Petitioner's counsel conducted additional, searching inquiries with at least two jurors. In doing so, one juror allegedly made a fleeting comment about reviewing biographical information concerning the ***lawyers*** on the internet. Petitioner's counsel took it upon himself to use that comment as license to conduct further juror questioning – running afoul of Fed. R. Evid. 606(b). At no time did Petitioner bring such contact to the district court's or opposing counsels' attention. Petitioner's communications with jurors continued for some time. Over a period of months, he obtained multiple affidavits from at least two jurors, including Juror #4

(which were drafted by his counsel, appearing on firm letterhead).[3]

Thereafter, Petitioner engaged in extensive post-trial motion practice based on misrepresentations, improper juror contact, and unseemly attacks against opposing counsel, the court reporter, and the district judge. (R. 48-79). Petitioner claimed he was entitled to a new trial because Juror #4 purportedly read about the attorneys on the internet. However, Petitioner presented no evidence Juror #4's research regarding the attorneys affected the verdict. The affidavits submitted stated only that Juror #4 read about *the attorneys*. (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.). There was no evidence he reviewed anything substantive about the case or that he shared the information he purportedly reviewed.[4] *Id.* Moreover, there was absolutely no indication extrinsic evidence made its way into deliberations. *Id.*

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[3] (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff. (dated July 7, 2008); R. 50, Juror #5 Aff. (undated); R. 70, Motion for Reconsideration, Ex. 1, Juror #2 Aff. (dated Nov. 21, 2008); Ex. 2 Juror #5 Aff. (dated Nov. 26, 2008)).

[4] Other than sheer speculation, Petitioner has never presented any evidence that Juror #4 reviewed the underlying opinion from Petitioner's first appeal. (Pet. Brf. p. 1). Assuming *arguendo* that he had, there still is no evidence that doing so would have prejudiced Petitioner or denied him a fair trial. To the contrary, any review of the opinion would likely have prejudiced Respondent, as the Court of Appeals remanded the failure to promote claim, indicating that an alleged comment about Petitioner's accent could be viewed as direct evidence of discrimination. *See In Re Rodriguez*, 487 F.3d at 1009-1010.

The district court denied Petitioner's requests for a mistrial, judgment notwithstanding the verdict, and for a new trial, as they pertained to the alleged juror misconduct for several reasons: (1) the submitted affidavits were insufficient on their face to warrant a new trial; (2) Petitioner's allegations of bias were pure conjecture; and (3) Petitioner's post-verdict, juror contact was improper. (R. 62, Order Denying Motion for New Trial, pp. 3-8; R. 64, Order Denying Motion for Reconsideration, pp. 1-3). The district court noted that "Counsel had the opportunity to obtain a 'perspective on the verdict' from jurors in the presence of the court by joining the court in talking to the jurors in the jury room immediately after trial." (R. 62, p. 7). Because Petitioner had absolutely no grounds for contacting jurors – and did so without providing any notice to the court or opposing counsel – the district court admonished him for engaging in post-verdict examinations that "went beyond idle curiosity and [were] improper." (R. 62, p. 8). The district court also found that counsel for Petitioner's attestations that Juror #4 "was the most outspoken in *explaining and defending the verdict*" strongly suggested impermissible questioning in violation of Fed. R. Evid. 606(b). *Id.*, pp. 7-8 (*quoting* R. 48, Ex. 1, Martin Aff. ¶ 2) (*see similar attestations at* R. 48, Ex. 2, Juror #2 Aff., ¶ 4 and R. 50, Juror #5 Aff., ¶ 4). When Petitioner moved for reconsideration based on these same affidavits, the district court again admonished him, holding that "[c]ounsel's improper questioning of the jurors cannot be condoned." (R. 64, Order Denying Motion for Reconsideration, p. 3).

Further, the alleged information reviewed was about the lawyers – not the case. The district court pointed out "[a]ny [alleged] undue bias a particular

juror held against attorneys who represent minority employees or large corporations was the proper subject of voir dire." (R. 62, Order Denying Motion for New Trial, pp. 6-7) (citing, *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981)). In doing so, the district court properly distinguished between acquiring information regarding the facts of the case, as opposed to such general information. *See United States v. Gonzales*, 227 F.3d 520 (6th Cir. 2000) (reversing an order for new trial based on juror's alleged knowledge about defendant's counsel); *Price v. Kramer*, 200 F.3d 1237, 1255 (9th Cir. 2000) (jurors' revelation of past experiences with police was "general" in nature, and different than the type of information courts proscribe – such as extrinsic experiments related to the case).

The district court also determined that Petitioner's untimely Rule 51(b) argument was meritless. It was not required to give a proposed jury instruction even if agreed to by both parties.[5] Further, as noted by the district court, the Sixth Circuit has not adopted any pattern jury instruction regarding internet use. (R. 73, Order re: Motion to Correct Record, p. 2). Additionally, Michigan's recently-adopted MI Civ. J.I. 2.06, concerning juror computer use, ***did not become effective until September 1, 2009***, well over a year after the trial in this case ended. Even if the Michigan Supreme Court had adopted such an instruction prior to the trial date, however, not giving such an

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[5] Petitioner's Rule 51(b) arguments are baseless because the district court specifically told the parties (both on the record and in chambers) that it would not read all of their proposed instructions and statements. (R. 68, Trial Trans. Vol. 1A, p. 5:19-6:4).

instruction in federal court was still within the district court's discretion.[6]

On September 30, 2008, Petitioner filed a Notice of Appeal. Petitioner again claimed he was entitled to a new trial because Juror #4 purportedly read about the attorneys on the internet and because the district court denied an evidentiary hearing. In an order and opinion dated November 15, 2010, the Court of Appeals reviewed Petitioner's multiple claims and affirmed the district court, finding that it had thoroughly and meticulously analyzed the relevant issues in the district court's 19 page opinion denying the Petitioner's request for a new trial.[7] (Pet. Appx. 2a). Contrary to Petitioner's suggestion, the condensed opinion does not mean the Court of Appeals did not analyze the issues regarding the proposed internet jury instruction or the post-trial evidentiary hearing. (Pet. Brf. p. 17). Quite simply, the Court of Appeals noted that in light of the fact the district court set out the applicable law and correctly applied the law to the facts in the case, it found that a full opinion would serve no useful purpose. (*Id.* at 2a, 4a). On December 9, 2010, Petitioner sought an *en banc* review. The entire bench found Petitioner's arguments less than compelling and denied the request. (Pet. Appx. 39a-40a).

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[6] Because there is now a model state jury instruction regarding internet use, even if this Court were inclined to resolve an issue of state law (which it is without authority to do), there is nothing to correct.

[7] The Court of Appeals also indicated it was not empowered to create a model jury instruction. (Pet. Appx. 4a).

III. REASONS FOR DENYING THE PETITION

Petitioner portrays his case as one involving novel, state-of the-art, issues by interjecting speculative arguments about Juror #4, and the internet and its potential usage by jurors, in a desperate attempt to obtain review by this Court. However, his portrayal bears no resemblance to the run-of-the-mill, low-tech, employment discrimination case actually litigated and decided by the courts below. None of the "facts" described in the post-trial journals and publications, or the few *post-hoc* cases relied upon by Petitioner, occurred in the case below. There were no "tweets", facebook messages, e-mail sharing or Google searches regarding the facts of the case or otherwise. Instead, one juror allegedly read background information about *the attorneys* – information which was voluntarily shared with the jurors by Petitioner's counsel during the trial.

Only two issues are relevant to this Petition – whether the district court erred by not reading a proposed instruction that prohibited internet use by the jurors and whether the district court erred by not granting an evidentiary hearing after it was purportedly discovered that Juror #4 read about the parties' attorneys on the internet. The decisions of the district court and Court of Appeals regarding these two narrow issues do not conflict with a ruling of any other Circuit or this Court, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not demonstrated a "compelling reason" for the Petition to be granted. S. Ct. R. 10(a)-(c). Nevertheless, the lower courts ruled appropriately on both issues raised by Petitioner.

1. The District Court Properly Instructed the Jury as to Conducting Research About the Case and Disregarding Extraneous Information

Here, the district court instructed the jury to consider only witness testimony and exhibits received into evidence, and to ***disregard any personal knowledge of any particular fact in this case.*** (R. 75, Trial Trans. Vol. 5B-1, Jury Charge, pp. 12:9-18, 14:4-6; *see also*, R. 68; Trial Trans. Vol. 1A, p. 53:17-20 (instructing the jury to disregard anything heard outside of courtroom and to decide the case solely on evidence presented in court)).

The district court also provided an instruction that jurors refrain from conducting research about the case, which stated:

> Secondly, do not read or listen to anything about **the case** in any way. . . . Third, do not try to do any research or make any investigation about **the case** on your own. . . .

(Resp. Appx. 3b (emphasis supplied)).

Even though Petitioner's proposed jury instruction was not read, the above instructions adequately addressed his concerns regarding internet research, as it encompassed *all* research regarding the case. There is no legal support for Petitioner's contention that the district court was required to provide a specific "internet use" instruction. Moreover, the district court could not have contemplated giving any *post-hoc* model instruction which *did not exist* at that time of trial.

2. Petitioner's Juror-Misconduct Claim Does Not Warrant a New Trial

The district court correctly denied Petitioner's requests for a mistrial, judgment notwithstanding the verdict, and for a new trial concerning Petitioner's allegations of juror misconduct for several reasons: (1) the submitted affidavits were insufficient on their face to warrant a new trial; (2) Petitioner's allegations of bias were pure conjecture; and (3) Petitioner's post-verdict, juror contact was improper. (R. 62, Order Denying Motion for New Trial, pp. 3-8; R. 64, Order Denying Motion for Reconsideration, pp. 1-3).

Not every trial irregularity invalidates a verdict. *Brown v. United States*, 411 U.S. 223, 231-32, 93 S.Ct. 1565, 1570-71, 36 L.Ed.2d 208 (1973) (litigant "is entitled to a fair trial but not a perfect one"). And vague allegations of juror misconduct do not necessitate a new trial. *United States v. Wayne*, 388 F.2d 535, 537 (6th Cir. 2004). Rather, a new trial ***only*** is warranted where the movant demonstrates by a preponderance of the evidence that extraneous influences so prejudiced jury considerations that he was denied a fair trial and, absent such extraneous influences, the outcome would have been different. *Gault v. Poor Sisters of St. Frances Seraph of the Perpetual Adoration, Inc.*, 375 F.2d 539, 549-551 (6th Cir. 1967); *Marks v. Shell Oil Co.*, 895 F.2d 1128, 1131 (6th Cir. 1990); *Hard v. Burlington N. Ry. Co.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

A new trial is ***not*** warranted where the movant fails to present evidence that a juror's conduct affected the outcome at trial. In *United States v. Copeland*, 51 F.3d 611, 613 (6th Cir. 1995), for example, the Court of

Appeals affirmed the denial of a new trial where a juror's relative observed proceedings the jury did not, holding that previous instructions not to discuss the case with outsiders was a sufficient remedy. Similarly, in *United States v. Johnson*, 308 Fed.Appx. 968, 973 (6th Cir. 2009), where a juror brought baking soda into the jury room to show other jurors what 2 ounces of drugs looked like, the Court of Appeals determined the district court properly remedied any misconduct by instructing the jury to consider only the evidence presented at trial.

Even more instructive, in *United States v. Wheaton*, 517 F.3d 350, 361 (6th Cir. 2008), the Sixth Circuit reviewed a request for new trial where a juror used a computer to access information about the distance between two towns discussed during the trial. 51 F.3d at 361. When the juror's actions were brought to the attention of the district court, it instructed jurors not to rely on outside evidence. *Id.* The court affirmed a denial of the motion for new trial, stating the request for a new trial must fail because the litigant had "not demonstrated that any prejudice resulted from the misconduct." *Id.* at 361.

a. The Courts Below Properly Denied an Evidentiary Hearing

An evidentiary hearing is not warranted every time a party claims extraneous information reached the jurors. "A hearing is required only when there is a colorable claim of extraneous information that presents a likelihood of affecting the verdict." *Gonzales*, 227 F.3d at 527 (internal quotations omitted). As the district court indicated, "to be entitled to an evidentiary hearing ... the party seeking

the hearing must allege specific conduct by a juror that resulted in undue influence." (R. 62, p. 5 (*citing Marks*, 895 F.2d at 1131)). Unless the submitted affidavits ***on their face*** show the outcome would have been different, no evidentiary hearing is required. *Hard*, 870 F.2d at 1461.

Here, the district court properly investigated Petitioner's allegations of misconduct through detailed considerations of the affidavits provided. (R. 62, pp. 3-4, 8). But those affidavits lacked any evidence Juror #4 provided information about the attorneys to other jurors or allowed it to affect his vote during deliberations. (R. 48, Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.) Thus, Petitioner failed to establish any connection between the attorneys' background and the final verdict in this case. *Price*, 200 F.3d at 1255 (to grant a motion for new trial, a "direct and rational connection" must exist between the information presented by the juror and the jury's conclusion). *See also Gonzales*, 227 F.3d at 527 (declining to order an evidentiary hearing based on the foreman's alleged statement that "defense counsel always represents guilty clients," holding it did not present a likelihood of affecting the verdict). Here, the Court of Appeals correctly affirmed the district court's denial for new trial.[8]

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[8] When reviewing the denial of a motion for a new trial, the Court of Appeals properly viewed the evidence in the light most favorable to Respondent, the nonmoving party. *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004). Further, all credibility issues were required to be viewed in a light most favorable to the jury verdict. *Wheaton*, 517 F.3d at 365. The Court of Appeals could reverse the district court only if it found an abuse of discretion. *Id.*, at 361 (the trial judge is in the best

b. An Evidentiary Hearing Was Unnecessary

Petitioner contends that an evidentiary hearing was necessary to determine: (1) what Juror #4 read on the internet; (2) whether he read the Court's opinion in Petitioner's previous appeal; and (3) whether he shared any information he reviewed with other jurors.[9] (Petitioner's Brief, p. 18). As the district court correctly noted, the affidavits submitted already established these issues, and no additional hearing was necessary.

Petitioner attorney's affidavit indicated exactly what Juror #4 allegedly reviewed. He read about the attorneys' "background, education and areas of practice." (R. 48. Motion for New Trial, Ex. 1, Martin Aff., ¶¶ 3-4). Jurors #2 and #5 agreed that Juror #4 only stated that he read about the ***attorneys***, not about the case. (R. 48, Rodriguez's Motion for New Trial, Ex. 2, Juror #2 Aff., ¶ 3; R. 50, Juror #5 Aff., ¶ 3). Neither juror indicated Juror #4 said anything specific about what he read. *Id.* Furthermore, Juror #5 was one of the people who accompanied Juror #4 to lunch before deliberations, and all he indicated was that "Juror #4 told us that he went on the Internet and read all about the attorneys in the case." *Id.*

---

position to assess the alleged misconduct and appropriate remedies).

[9] There is no evidence whatsoever to support Petitioner's contention that "[a] hearing would have established that [Juror #4] used the extraneous information to deny Petitioner a fair trial." Pet. Brf. p. 3.

Petitioner's counsel interviewed these jurors and prepared their affidavits. If the jurors had any additional information to add, they certainly would have included it. Thus, from the affidavits, it already was clear: (1) Juror #4 read background information about the lawyers only; (2) therefore, he did not read the earlier opinion about the case; and (3) the specifics about what he purportedly read were not shared with other jurors. There was and is no need for additional inquiry.

c. Petitioner's Arguments Are Mere Speculation

Petitioner was obliged to offer more than a "serious suspicion" of juror bias. *Johnson*, 308 Fed.Appx. at 973. The law required him to demonstrate how juror misconduct prejudiced his case. Contrary to Petitioner's argument, such "prejudice will not be presumed." *Id.* (*citing United States v. Branham*, 97 F.3d 835, 855 (6th Cir. 1996); *United States v. Gillespie*, 61 F.3d 457, 460 (6th Cir. 1995); *see also*, *McCoy*, 652 F.2d at 659 n.9 (indicating allegations must be "non-conjectural").

Petitioner has provided *no* evidence Juror #4 prejudiced the outcome of this case. No juror raised any suggestion of undue influence or misconduct before the close of trial – including Juror #2 who voted in Petitioner's favor.[10] (R. 48, Rodriguez's Motion for New Trial, Ex. 2, Juror #2 Aff.; R. 50, Juror #5 Aff.).

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[10] *Munafo*, 381 F.3d at 107-108 (district judge was justified in according juror affidavits "little weight" because the affiant-jurors did not speak up when they had an opportunity before the judge and the affidavits were prepared "with the assistance of counsel").

Petitioner only presumes Juror #4 was biased against him and wildly speculates about what the juror "must have read." Such conjecture is insufficient to invalidate the verdict. (R. 62, p. 7; *Wheaton*, 517 F.3d at 361-362) (rejecting speculation that a juror might have used his computer to review defendant's criminal history and holding no new trial was required where defendant failed to show any real prejudice).

d. The Information Allegedly Reviewed Did Not Relate to the Case and Was Harmless

During his closing, Petitioner's attorney intentionally discussed his former UAW membership in front of the jury. (R. 68, Trial Trans. Vol. 5A, pp. 21:25-22:2). He also spent part of his rebuttal during closing discussing defense counsel and attorneys with "big law firms." (Resp. Appx. 12b-22b; R. 68, Trial Trans. Vol. 5A, pp. 58:9-59:2). Thus, Juror #4's alleged conduct was harmless given that Petitioner's own counsel already provided the jury with similar background information about the attorneys. Moreover, the district court's instructions as to evidence, personal knowledge, and comments by the lawyers, were sufficient to remedy any alleged irregularity. *See Johnson*, 308 Fed.Appx. at 973 (any danger the jury might consider evidence which had not been admitted at trial was ameliorated by cautionary instructions); *Copeland*, 51 F.3d at 613-614)(same).

3. Petitioner Should Not Be Rewarded By Obtaining Juror Affidavits Through Improper Means

The district court rightly noted that, "***in accessing Rule 606(b) affidavits, courts should also***

examine the circumstances under which the affidavits were obtained." (R. 62, p. 5 (emphasis added)). "The Supreme Court has long adhered to the general rule that a juror is incompetent to impeach his or her verdict." *Gonzales*, 227 F.3d at 523 (*citing Mattox v. United States,* 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892)). The policy considerations for this rule are obvious. If verdicts could be attacked by the testimony of those who rendered them, "[j]urors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915). To protect jurors and the sanctity of their verdicts, the law places limits on post-verdict questioning. *United States v. Rakes*, 169 F.2d 739, 746 (4th Cir. 1948) (searching or pointed juror examinations on behalf of a party is to be emphatically condemned); *Simmons First Nat'l Bank v. Ford Motor Co.*, 88 F.R.D. 344, 347 (E.D. Ark. 1980) (a party engages in post-verdict questioning of jurors without the court's involvement at its own peril). In particular, Fed R. Evid. 606(b), prohibits most juror inquiries, stating in relevant part:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. ... A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

The district court identified at least three factors that must be met before a party may properly engage in post-verdict juror questioning. The party must: (1) have reasonable grounds to do so; (2) provide advance notice to opposing counsel and the court; and (3) confine questioning to areas expressly circumscribed in Fed. R. Evid. 606(b). *Id.*, pp. 5-8 (*citing Simmons*, 88 F.R.D. at 347-348; *Rakes*, 169 F.2d at 745-746; *Stephens v. City of Dayton*, 474 F.2d 997 (6th Cir. 1973). Such factors were not met in the case.

As discussed above, federal courts have a long history of holding jury deliberations inviolate. To preserve our system of justice, and protect jurors from needless harassment that would greatly reduce their willingness to serve, juror contact must be extremely limited and conducted under court supervision. If conduct engaged in by Petitioner's counsel is permitted to form the basis for review by this Court, it will eviscerate Fed. R. Evid. 606(b) and open the floodgates of post-trial jury tampering.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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Dated: May 19, 2011

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 23, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 1A

Monday, June 23, 2008

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

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To Obtain Certified Transcript, Contact:
Ronald A. DiBartolomeo, Official Court Reporter
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 238
Detroit, Michigan 48226
(313) 962-1234

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

* * *

[p.55]

just as an individual would be treated.

In this case the plaintiff claims that the defendant failed to promote him or that the defendant was motivated for discriminatory reason in failing to promote him.

I've given you some instructions on the elements of the case that need to be established by the plaintiff to make his case, and I'll give you more detailed

instructions at end of the case on those elements of proof. Those instructions will control your deliberations and your decision in the case.

Now a few words about conduct as jurors.

First, I instruct you that during the case you should not discuss the matter with anyone or permit anybody to discuss it with you. Until you retire to the jury room at the end of the case to deliberate on your verdict, you ought not talk about the case.

Secondly, do not read or listen to anything about the case in any way. If someone tries to talk to you about the case, bring it to the Court's attention promptly.

Third, do not try to do any research or make any investigation about the case on your own, and finally, you ought not form any opinions about the outcome of the case until after you heard all of the evidence. Keep an open

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mind until you start your deliberations at the end of the case.

If you want to take notes during course of the trial, you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time, and to observe the body language, the nonverbal communication that tells you more about the witnesses response than the verbatim response. If you are talking notes, you should make

sure it doesn't interfere with your listening to and considering all of the evidence.

Also, if you do take notes, you should not discuss them with anyone else before you begin your deliberations, and you will leave your notes with us at the end of the day in the jury room, and then they will be available to you to consider during course of your deliberations.

If you choose not to take notes, remember that it is your own individual responsibility to listen to the evidence, and we depend on the judgment of all members of the jury. You all must remember the evidence in the case.

The trial is going begin now with each side making an opening statement. An opening statement is not evidence and it is not argument. It is suppose to be an outline of what the party intends to prove to help you follow evidence as received during the course of the

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 25, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 3A

Wednesday, June 25, 2008

– – –

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

– – –

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* * *

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on your W-2 that you earn $42,081.12, is that correct?

A. Yes.

Q. For 2002 you earned $42,567.16, is that correct?

A. Yes.

Q. And 2003 the year you left around July 30th, you had earn up to that point $16,333.04, is that correct?

A. Yes.

Q. And also you received some worker's compensation?

A. Yes, it would not be on there.

Q. Which I believe was approximately $6,000?

MS. BRODEUR: Is that a question or testimony Mr. Martin?

MR. MARTIN: You provided me with documents that indicated the amount of worker's comp that he received as part of the one of the exhibits. You can cross examination if you want to dispute.

MS. BRODEUR: Sure.

MR. MARTIN: You believe it is $6,000 in worker's comp?

A. I have no idea. I'm thinking it is.

BY MR. MARTIN

Q. Okay. Now I'm handing you has Defense Exhibit Number 17.

THE COURT: Are you asking for Number 1 to be

* * *

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Q. You heard him say sometimes he was in charge of Illinois, Indiana and part --

A. I knew he came to Detroit, and I knew he was from Indiana.

Q. And you never submitted an application to any other facility?

A. No.

Q. E-mails, hey I'm interested in being a supervisor?

A. No.

Q. If I understand you, it is your contention that because you checked off a box in the LAC saying that you wanted to relocate, that entitled you to a job somewhere else in the United States?

A. No.

Q. Would you agree with me as a general proposition, that if you received that supervisor job awarded to Walter Adams in 2002, you would have a received salary of $45,000?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Did you learn that now -- or were you aware when working in the Romulus facility?

A. They told me about how much it would be.

Q. And I see in Plaintiff's Exhibit Number 1, for

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instance, in 2001 you made close 42,100?

A. Yes.

Q. And would you agree with me, would you not, had you been given the supervisory job in that year, the amount of what supervisor made was 45,000 less the 42,081 that you earned?

A. Yes.

Q. So you were looking at approximately almost 3,000 for that year?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. And to go on the same thing, you agree that in 2002 you made 42,567?

A. Yes.

Q. The different is 2,500 bucks?

A. Yes.

Q. And that is the same logic for 2003?

A. Yes.

Q. If you do the math, that is your salary for seven months?

A. Yes, because of worker's comp.

Q. Sure. You have to add that in?

A. Yes.

Q. Speaking of worker's comp, let make the record more

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 08-10637
HONORABLE GEORGE CARAM STEEH

[Dated June 27, 2008]

JOSE RODRIGUEZ,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
FEDEX FREIGHT EAST, INC.,	)
	)
Defendant-Appellant.	)
	)

JURY TRIAL
VOLUME 5A

Friday, June 27, 2008

– – –

APPEARANCES:

For the Plaintiff-Appellee:
D. RICK MARTIN, ESQ.
RONALD D. GLOTTA, ESQ.

For the Defendant-Appellant:
LAURA A. BRODEUR-MCGEORGE, ESQ.
MATTHEW S. DISBROW, ESQ.

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in here. What's the problem? They say he didn't say anything about discrimination. Can you believe that? Why would he deny it when he gave him this letter? You have to ask yourself, if they are willing to come in here and lie under oath, what would they do about discrimination?

After the telephone conversation Mr. Rodriguez said I'm out of here. You know, now you want to hear. Now you want to hear. Yeah, because here comes a lawsuit. I'm out of here. I told my wife I'm out of here. I told my family who I am yelling at for no reason I'm out of here. That's it. I'm taking a chance.

What are the damages in this case? If you believe Jose Rodriguez's case and disbelieve the defendant's testimony on the stand -- fortunately I didn't have to prove that they lied. One of their own witnesses, John Ravenelle and Sammy Reid, he said he just heard about this case on Friday. Ravenelle knows it was November O3 when we got the lawsuit. You have to think that's big.

You've given up time from your family to try to do justice. You want to make sure that you make the right decision. That's the beauty of this country. It puts justice in your hands. If you believe the plaintiff's case and you find for the plaintiff, then the Judge will instruct you on economic damages. The law says economic damages, if you found that it should be given, the job

[p.29]

that Spinney was given, if you think that, you start at 2001, deduct $42,081 from what Spinney was paid. There is a list that shows about 45,000 -- 45, 46,000 -- deduct the difference. Those are economic damages in 02 before Mr. Adams was hired. If you believe that McKibbon should have hired Jose, he didn't know nothing about program, never received the package, and if he had, we know he would have done it. We watched this man. This is a man going to work on crutches at 4:00 in the morning. Then you find out what -- what did he earn as a truck driver in 02, 42,500, and what did Mr. Adams eventually earned when he got hired, which was 45,000, you add that difference, and the third year, which is 03, where they hired -- 03 they hired someone else again, whose application is here, and we can't cross examine him to see what's true and not true. You don't know, but if you find those three years those are economic damages, that is all you can award on economic side.

But this case is not just about economic damages. This case is about the pain of discrimination, the pain of discrimination like someone die in the family. You may be in pain for that, for years. In this case Jose Rodriguez, you heard him testify, will live with this pain for the rest of his life, rest of his life. He even told you that with his children, I don't Spanish. I took that language

* * *

[p.58]

Mr. Adkinson. They have done nothing wrong. Rather than encourage this type of lawsuit again, you need to tell my client FedEx that they did the right thing and promoted the right person for this job, plain and simple.

Thank you.

THE COURT: All right. Thank you.

Mr. Martin, your rebuttal?

MR. MARTIN: Thank you, your Honor.

You know a lots of big corporations, they have a lot of resources Ford, General Motors, Chrysler, FedEx. They have a lot of resources when they throw that resource at any big law firm and say defend us. Even if we have done wrong, defend us because somebody wins. We don't want the other people to start suing. Defend us, and those lawyers in the big law firms, they go to the EEOC job right out of law school to get started so you can go to the big law firm if you want big money, and if you want to represent people. You don't do it just because you want to work for the EEOC.

Look, you heard all the time that lawyers take either case. That's how you are trained in law school. Represent either side. That's your job, and if you decide I want to go to a big law firm, you've got to do -- you have to defend them, which means you have to defend a Sammy Reid who looks you in the face and lied. You have

[p.59]

to defend him. You have to defend John Ravenelle who said the meeting never happened with Rodriguez.

Now she relied -- sister counsel relied on Scrimenti for all the good things that she wanted to say. Scrimenti said Adkinson was a good guy. So if Scrimenti was believable, then she has to -- when she said John Ravenelle and Jose did meet and Jose, she didn't say didn't talk or walk away. She stood by her statement. It was specific. She said Jose told him -- she says if, in fact, she knew Jose had been offered the supervisory position look, I was denied this position because --

MS. BRODEUR: Objection. That is a fact not in evidence.

MR. MARTIN: Your Honor, she testified -- she testified -- it's in the affidavit. She relied upon the statement, and again, I could stand up and objected to the many false representations that counsel made, but I did not. We rely on the jury to recall the facts.

THE COURT: Go ahead.

MR. MARTIN: Thank you, your Honor.

She was specific. She said they met and a discussion took place, and Jose said, hey, this guy was denied a job because of his accent. That is what was heard. Jose didn't say -- Jose could have lied and said that -- talk about lies -- Jose could have said John

[p.60]

Adkinson (sic) came up and said, I'm not giving you this job because you're Hispanic. Jose was free to do that, just like Sammy Reid was free to lie to you, and he did. Jose didn't. John Ravenelle is free to lie to you, and he did. Jose didn't. He could have said Mr. Adkinson said no Hispanic. No Hispanic. He could have said that easily, but he did not.

He testified look, I came and started talking about a supervisor job in June 02 when Mr. Adams' job was at issue. So that was a small misstatement. They told whoppers. You got the downhill and the whoppers. That's what they came with and did, and they did it for a reason. Jose didn't do it to try to win the case. They did it because they may lose the case. All pulled all the recourses they could to make sure. Everything you've seen, the people in court, they weren't witnesses. They were lawyers, counsel.

MS. BRODEUR: I object. I have no idea who was in the gallery.

MR. MARTIN: We had all the witnesses sequestered.

THE COURT: Sustain that objection. Disregard the comment.

MR. MARTIN: That's why, ladies and gentlemen of the jury, we fought so hard to get the letter in

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because we knew it would be tough with their resources, and I will tell you that the LAC is a bridge to nowhere for certain people, and the bridge to nowhere didn't give him a package.

Ms. Robinson said even if on a computer, you've got to get the package sent for the training. What good is the training if you don't have the package? Okay. I got on the job training. That is what Jose was thinking. No school for LAC. The school for the LAC is at the workplace, right at the workplace. He said he thought the supervisor would okay it and send a report in saying he is doing fine. He is doing this.

Again, you have to ask yourself, it is not like Jose cannot read or write, he doesn't make sense. You have to ask yourself, it doesn't make sense, but using LAC as a shield in this case, don't buy it. You must realize this LAC -- all this thing about LAC is after Jose -- all the names they mention is after Jose. Why is that? Because when Jose left, we got LAC to get people promoted. Here we have Breitwiser three, four months after Jose. That's good. Got one, but where are all the other people if it is not the bridge to nowhere?

The company looks to keep control. We want to do what they want to do when they feel like doing it, and discriminate. They want to discriminate female, African

[p.62]

Americans, Hispanic, disable or age when they want to do it. How do you get that freedom? Not having

anything written down. Most corporations have a policy right there. FedEx is a big corporation, big company. You tell me they can't put it in writing? When people don't want something in writing, there is a reason. What is it? The postings.

Ms. Brodeur talks about can't consider Jose for any other positions outside. You can put his name down. I'll go anywhere, and you can consider him for 16 positions under Mr. Adkinson.

MS. BRODEUR: Objection.

MR. MARTIN: Sixteen service centers where jobs were available. It is their duty to say, you know what? I am interested. We didn't have anything in 16 places especially since we don't post. They told you. We don't post. Why? Why not post so everyone can know? Because you want to control. There is a supervisor, somebody's nephew. You control big corporations, like control as far as Mr. Adams.

What did he tell you talking about a supervisor's job? Counsel wants you to believe it was his supervisory experience and transportation. Let's put it together. Jose drove all of that time, big trucks. He did that, and he had leadership skills in that area. He knows all the

[p.63]

routes, all the things. That is supervisory skills in transportation. One plus one equals two, and Mr. Adams told you -- you remember I asked him, if you worked your way up from a dock worker? No, worked cars to a supervisor at UPS, a competitor without LAC,

without anything. Just what did he say? Hard work, hard work and knowing the job. It makes sense. As I said, it is not rocket scientist.

Think about it. Someone leaves. You can step in if you want to. Mr. Adams said after a supervisor, that's more training, additional training.

THE COURT: You have five minutes.

MR. MARTIN: It was after -- it was after Ms. Brodeur became a lawyer -- she first worked hard and how she got additional training. We are talking about a supervisor over a worker who drives a truck that he's driven. Obviously that wasn't that important for LAC. They've been around since the 1950's. They've been around. They've been growing with supervisors that had never been to LAC. So we know it is not like going to nursing school or nurses where you have to have that. It's not, and this is why you have to look at their defense in this case.

Was there a lie? Everybody lies because we got to protect ourselves now, and as far as Mr. Adkinson, he

[p.64]

rehired him. Yeah, to be a driver. To be a driver. Oh, yeah. I want you back to be a driver. Just drive trucks. That's it.

We use to have kids working the mines before the union. These are things they will do if you don't stop them, children in mines. You can do this, this and this. No female, you're African American, even white male too many or too less. Can't go over here.

As the Judge said, I have a couple of more minutes. Ms. Brodeur is right. This case is about credibility. All of this stuff can be so confusing. It's about credibility. Did mr. Reid tell you the truth, or did he lie? Did Mr. Ravenelle tell you the truth, or did he lie, lie to your face? It is one thing to lie to your face outside, but when you take the oath in a federal court in front of a judge, and you are searching for the truth, you want to be fair. You want to do the right thing, and then you lie and say, I heard about this case on Friday from Ms. Brodeur.

Thank God we have a jury. Thank God you have that power to right a wrong. She's right, your verdict is important to FedEx. You decide for Mr. Rodriguez. You're saying, you need to change the way you do things. That is not right. It's not right how you treat people. It is not right do the things that you do. It is not right, and

[p.65]

we are not going to stand for it.

Mr. Rodriguez has helped a lot of people since that happened to him. Look at the people that's been -- completed the LAC. They have cleaned it up. They do it right. We have Rodriguez. We know it is coming here. We need to do it right. He has done something to other people, the same people who passed. They have given them a supervisor job.

You can't give him that. Do justice. You can give him justice for the rest of his life that he will suffer knowing that he was denied something because of something, because of something he couldn't help.

Thank you so much.

– – –

RECORD
AND
BRIEFS

(3)

Supreme Court, U.S.
FILED
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No. 10-1226

In the
Supreme Court of the United States

JOSE ANTONIO RODRIGUEZ,
Petitioner,

v.

FEDEX FREIGHT EAST, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

The question this Court has to address is the fact that the rapid advancement of technology is overwhelming the procedural and constitutional protections of a fair trial. This case offers the ideal vehicle to address the procedural steps to be taken to ensure a fair trial in the age of ***Cyberspace***.

The following errors were committed by the district court and affirmed by the Sixth Circuit:

(1) There was no instruction specifically prohibiting the use of the Internet although jointly requested by the parties[1];

2) There was no hearing to determine whether Juror #4's use of the Internet tainted the decision making process.

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[1] The district judge held that no instruction relative to the Internet was given. (Pet. Brf. p. 14) The judge also gave no explanation for his omission of such an important instruction as mandated by Rule 51(b). (Id.) Contrary to Respondent's argument, (BIO-8) no objection was required to preserve Petitioner's Rule 51 issue for appeal because **both** parties timely requested a specific instruction *prohibiting the use of the Internet* for any purposes regarding the case. (R. 35, Parties Proposed Joint Jury Instructions, No. 13, p. 18) See *Pooshs v. Fluoroware*, 83 F.3d 428, 430 (9th Cir. 1996)

Every jury trial requires explicit and clear instructions that specifically prohibit the use of the Internet for any purposes regarding the case[2].

> [T]he alteration and modernization of jury instructions is the most crucial change that ***must take place to curb this kind of misconduct, and should be immediately implemented in every court room.*** Updating jury instructions further puts each juror on notice that every time he or she tweets about a case, posts blog on Facebook or MySpace, or researches the parties on the Internet, he or she is also engaging in misconduct that may subject that juror to discipline. (Amanda McGee, "Juror Misconduct in the Twenty First Century, 30 Loy. L.A. Ent. Rev. 301, 324, Pet. Brf. p. viii) (emphasis added)

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[2] In a paper entitled "Jurors in the Digital Age," Thaddeus Hoffmeister, a law professor and legal commentator who closely studies jury issues suggests: "One way to increase the likelihood of adherence is to use language easily understood by laypersons. This includes avoiding overly technical terms and offering descriptions of improper conduct. One U.S. Magistrate Judge provides jurors with examples of seemingly innocent online communications that can jeopardize a trial. This is important because some jurors are unclear on what actions violate court rules. **For example, some jurors don't consider looking up the name of a party on Google as gathering evidence about a case. To them, gathering evidence means going to the library or the actual crime scene, not performing a name or image search on Google...[I]n addition to being told 'what' they can't do, jurors need to know 'why' they can't do it.**" "Jurors in the Digital Age by Thaddeus Hoffmeister, http://work.press.com/thaddeus_hoffmeister/7(emphasis added)

Delay in addressing this issue will further undermine current constitutional protections. This is an ideal vehicle to resolve both questions presented.

Respondent's Brief in Opposition ("BIO") underscores why review is necessary in this case. Respondent minimizes the significance of the Sixth Circuit's failure to address the serious and imminent threat the Internet poses to the jury trial system. ***A threat that the First, Third, Eighth, Ninth and Eleventh circuits recognized and vigilantly addressed by updating and modernizing their pattern jury instructions to include specific prohibitions against jurors' use of the Internet.***

The Sixth Circuit, however, refused to provide similar constitutional safeguards and procedural protections for its litigants, despite emphatic urgings and recommendations to do so from the United States Judicial Conference Committee on Court Administration and Case Management ("CACM"). (Pet. Brf. p. 37)

It is essential that this Court grant review now, before the technology makes matters worse. Review is necessary for this Court to provide concrete guidance, constitutional standards, and procedural protections to address this new and intractable phenomenon.

This Court can (1) require ***all*** judges to give instructions that specifically prohibit jurors from using the Internet for any purposes regarding the case; and (2) make an investigatory hearing **mandatory** any time a juror use the Internet for case-related purposes, particularly where, *as in this case*, the allegation of

juror misconduct is supported by sworn affidavits from fellow jurors.

II. ARGUMENT

A. THE ABSENCE OF CLEAR STANDARDS AND PROCEDURAL PROTECTIONS TO ADDRESS THE THREAT THE INTERNET POSES TO THE SIXTH AND FIFTH AMENDMENTS GUARANTEE OF A FAIR TRIAL BY IMPARTIAL JURORS WARRANTS REVIEW BY THIS COURT

Respondent offers no substantive defense of the Sixth Circuit's decision affirming the district court's refusal to specifically instruct the jurors not to use the Internet. **An instruction both parties agreed upon and requested**. (R. 35, No. 13, p. 18) Respondent asserts that "Even though Petitioner's proposed jury instruction was not read, the instruction given by the district court adequately addressed his concerns regarding internet research, as it encompassed all research regarding the case." BIO-11. The instruction never mentions the word *Internet*. That by itself establishes the invalidity of the instruction.

Respondent's argument is at best, disingenuous since the ***"jointly"*** proposed instruction that specifically prohibited jurors from using the Internet for any purposes regarding the case, **was drafted, prepared and filed with the district court by Respondent**. (Docket No. 2:8-CV-10637, R. 35, No. 13, p.18) Obviously, Respondent believed that an instruction that did not specifically prohibit the use of the "Internet" could not "adequately" address the threat the Internet poses to the right of a fair trial.

Prohibiting Internet use will protect all parties' right to a fair trial.[3] In that sense, the question presented is *policy neutral*.

During a recent visit to the University of Florida Levin College of Law, Supreme Court Justice THOMAS was asked whether he believed the Court has kept pace with rapidly shifting technological changes. According to Justice THOMAS, technological change *within* the Court was less important than that occurring on the *outside*:

> [It's] changed the way we work, but it's also changed some of the issues...***I think you all are in for some interesting times because there used to be these zones of privacy*** . . . . Things were over here in the private sphere and then the public sphere was over here. Now look how [they've] merged. ***You put something on your Facebook, [and] it's there on somebody's hard drive forever***... We also see it with respect to how the government can obtain information in the criminal justice context. ***[The government doesn't] actually have to come onto property now, to look into your private affairs*** ... I think you all are in for the ***brave new world of technology in***

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[3] Respondent conspicuously fails to *directly* address Petitioner's argument that the district court (1) did not explain his reason for not giving the parties jointly requested Internet instruction; and (2) did not give the parties an opportunity to object *on the record* as mandated by Rule 51(b)(1)(2).

> ***a way that we, of course, couldn't have anticipated.***[4] (emphasis added)

The *"brave new world of technology"* referenced by Justice THOMAS has not only transformed the way in which the *government* can obtain information. It has also changed the way *jurors* can obtain information before and during a trial. ***Androids, Apple-iPhones, Smartphones, and Blackberrys,*** and other mobile devices allow jurors to access potentially prejudicial information about the litigants, witnesses and the attorneys—***without having to leave the jury box.*** For instance, if a juror wants information about prior law suits filed against a corporate defendant (deemed inadmissible) the juror can simply—***"Google it"***. Even worse, information obtained by a juror about a criminal defendant or witnesses on **Facebook or Twitter** can result in the unjust conviction, imprisonment or even the execution of an *innocent* human being.

The ramifications of the Sixth Circuit's decision to affirm the district judge's refusal to give the parties' ***jointly requested*** instruction that specifically prohibited jurors from using the Internet for any purposes regarding the case, reach well beyond Petitioner. It affects *every* litigant, in *every* federal district court in Michigan, Ohio, Kentucky and Tennessee.

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[4] Clarence Thomas, Associate Justice, U.S. Supreme Court, Address at the University of Florida Levin College of Law Marshall Criser Distinguished Lecture Series (Feb. 4, 2010).

As noted by legal expert and commentator Jeffrey T. Frederick:

> The increasingly prominent role the Internet plays in American **society*...poses a potential threat to the integrity of jury trials from the influence of outside information, both before and during trials.***
>
> As the Internet has gained widespread acceptance as a source for news and information, it has become a serious contender for concern regarding juror exposure to case-related information and opinions. ***Information relating to a case, either directly or indirectly, can reach jurors via a variety of Internet avenues: computers, cell phones, personal digital assistants, and the like.*** The Internet giant Google has turned searching for information and content into a multibillion dollar business, ***even gaining entry into our culture- and dictionaries- as the verb for Internet searching itself, i.e., "to Google."***..[j]**urors regularly turn to the Internet for answers**. (Pet. Brf. p. viii) (emphasis added)

In order to vastly reduce the rapidly rising number of "Google mistrials" and jurors' use of the Internet to undermine the integrity of the verdict—the Court must step in. Only this Court has the capability to effectively and immediately address the profound challenges presented by the *brave new world of technology* that is plaguing and infuriating trial judges and upending verdicts across the nation.

The failure to address the rapid changes in the dynamics of communication and transmission of information could *soon* result in ***"virtual"*** trials—that is, trials where the verdict will be based but upon "information" accessed by jurors in ***Cyberspace***—rather than upon the ***"evidence"*** presented to them in the ***Courtroom***, after being tested for truthfulness and accuracy by rigors cross-examination—and over ***three hundred years*** of jurisprudence.

The question presented in this petition provides the Court with the perfect vehicle to reexamine the core concepts of Sixth and Fifth Amendments and the Internet's implication on the right to a fair trial by *impartial* jurors. A right, that's being seriously threatened and undermined, in a way that our jury trial system in the words of Justice THOMAS—*"couldn't have anticipated"*.

B. THE SIXTH CIRCUIT'S DECISION TO UPHOLD—ABSENT ANY ANALYSIS—THE DISTRICT COURT'S REFUSAL TO CONDUCT A HEARING WHERE JUROR #4 OBTAINED EXTRANEOUS PREJUDICIAL INFORMATION ABOUT THE CASE, INCLUDING THE PRIOR SIXTH CIRCUIT'S DECISION, WARRANTS REVIEW OR, IN THE ALTERNATIVE, SUMMARY REVERSAL

Respondent does *not* seriously dispute that Juror #4 admitted to fellow jurors (during deliberations) that he ***read and learned all about the attorneys in the case on the Internet.*** (Pet. Brf. pp. 15-17.) Rather, Respondent asserts that this Court should deny review because "[A]t closing, Petitioner's counsel stated he was a former UAW member" and that Respondent's

counsel made "one comment about her background[5]." BIO -5. Thus, Respondent argues, Juror #4's alleged misconduct was "harmless". BIO- 17. The argument is specious, at best.

The record establishes that the Internet provided Juror #4 with an *abundance* of potentially ***prejudicial information about Petitioner's counsel*** that was **not** disclosed to the jurors during the trial. For instance, the Internet informed Juror #4 that Petitioner's counsel was not merely a former "member" of the UAW, but a union activist who became a UAW plant *president*, a strong proponent of affirmative action for minorities and women, a civil rights activist, a personal injury attorney and a criminal defense

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[5] The "one comment" Respondent conspicuously failed to reveal to the Court was that Respondent's counsel told the jury that she was a "former EEOC attorney". Using the *imprimatur* of that position to vouch for Respondent's actions Respondent's Counsel forcefully argued: **"I use to be a civil rights attorney at the EECO, and I can tell you representing people like Mr. Rodriguez, if there is any injustice here, it has been to FedEx and not Mr. Rodriguez."** (R. 68, Trial Trans. Vol. 5A, p. 57). Respondent's assertion that Petitioner did not object to Respondent's counsel's highly prejudicial comments, is correct. Instead, Petitioner's counsel chose to respond by arguing that Respondent's counsel is no longer a EEOC attorney and that her job *now* is to defend her clients—even where they have violated laws she once had a duty to enforce. Unfortunately, the transcript of the closing argument is rife with so many errors that much of Petitioner's counsel's argument was rendered unintelligible. The court reporter explained that the "crash" of his computer required him to prepare the transcript from his "notes". (R. 71, Rodriguez's motion to amend/ correct or modify the record, Ex. 2, Affidavit as to Martin)

lawyer.[6] (R. 65, Affidavit as to D. Rick Martin, Exs. 3 and 7)

In contrast, Juror #4's Internet research on Respondent's counsel revealed that she worked for a law firm that not only represented and defended major companies like FedEx, but also represents and defends individual health care professionals like *himself*, a pharmacist, Juror #1, a medical student, and Juror #8, a nurse. (Id. Ex. 5)

Respondent's assertion that Petitioner presented no evidence that Juror #4 reviewed anything substantive about the case, BIO-6, or reviewed the underlying opinion from Petitioner's first appeal, is incorrect.

The record establishes that when ***Juror #4 Googled "Laura Brodeur" and "D. Rick Martin"*** he obtained the underlying Sixth Circuit's decision in the case. (R. 65, Ex 6, R. 70, Ex. 10) The opinion provided Juror #4 with *substantive* facts about the *case* that were never disclosed during the trial. Even more prejudicial, Juror #4 learned that the district judge presiding over the trial—***is the same judge that believed Petitioner was not discriminated against because of his Hispanic accent and, therefore dismissed all of Petitioner's claims***. See *Rodriguez v. FedEx*, 487 F.3d 1001 (6th Cir 2007)

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[6] A hearing was required to provide Petitioner (and the district judge) with the opportunity to determine whether Juror #4 held strong beliefs about unions, affirmative action programs, personal injury lawsuits and criminal defense attorneys defending the "guilty" that simply made it *impossible* for him to be an **impartial** juror.

This Court's precedent is clear. Where a juror is alleged to have obtained extraneous information about the case, a hearing is required. The purpose of the hearing is to determine the precise scope and breath of the extra-judicial information obtained, how it was used, and to provide the moving party with an opportunity to prove the denial of a fair trial. *Mattox v. United States*, 146 U.S. 140 (1892); *Smith v. Phillips*, 455 U.S. 209 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing ..."); *Wellons v. Hall*, 558 U.S. ___ (2010) (Court stated that had there been discovery or an evidentiary hearing the petitioner may have been able to present more than "speculation" and "surmise" to support his juror misconduct claim)

The principles pronounced by this Court in *Smith*, *Mattox* and *Wellons*, required the district court to grant Petitioner's timely request for an evidentiary hearing. However, the district court apparently refused to follow this Court's precedent. In so doing, the court deprived Petitioner of his right to due process. The Sixth Circuit affirmed the district court's error.[7]

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[7] In so doing, the Sixth Circuit violated its own well established precedents, including *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999). There, the Sixth Circuit reversed defendant's conviction (upheld by the Michigan Supreme Court) because defendant was not given the opportunity to support his juror misconduct claim at an evidentiary hearing. In addition, in **all** of the cases cited by Respondent that alleged the verdict was tainted by extraneous information, ***an evidentiary hearing*** was held to determine whether the ***extraneous information*** tainted the verdict. In *United States v. Wheaton* 517 F.3d 350 (6th Cir. 2008) a case Respondent characterizes as "instructive", the district court, unlike here, promptly undertook a thorough investigation of the

That is precisely why this Court must state empathetically that, specific procedural protections against jurors' use of the ***Internet*** must be given by the courts, and must be vigilantly followed and enforced in every case. No exceptions.

C. BECAUSE JUROR #4'S ADMISSION TO OBTAINING EXTRANEOUS INFORMATION ABOUT THE ATTORNEYS IN THE CASE DISQUALIFIED HIM TO SIT AS A JUROR, THE VERDICT WAS INVALID AND SHOULD BE SUMMARILY REVERSED

The law is well established. Jurors that obtain ***extraneous information*** about the case they are deciding are no longer competent to serve as juror. *Aluminum Co. of Am. v. Loveday*, 273 F.2d 499 (6th Cir. 1959) (court held that a juror who obtained extraneous information "**disqualified himself**" to sit as a juror—even if he did not share the information with other jurors)

Here, Respondent concedes that the instruction given by the district court prohibiting research "encompassed *all* research regarding the case". BIO pp. 3, 11. Therefore, when Juror #4 used the Internet to conduct "*research*" and "read all about the attorneys in the case", he *disqualified* himself to sit as a juror. Without Juror #4's vote, **Respondent lacked the *seven* out of eight votes required for a valid verdict**. Thus, contrary to Respondent's assertions,

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alleged misconduct by ***questioning in chambers*** the juror in question with both counsels present, and also questioned all of the jurors in open court.

Juror #4's alleged misconduct *did* affect the outcome of the case.

CONCLUSION

For the reasons stated in the Petition and in the Reply, the Court should grant the petition for writ of certiorari, or, in the alternative, summarily reverse the judgment below.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 08-cv-10637
Hon. George Caram Steeh

Bankruptcy Court Case No. 04-47510-PJS
Chapter 7
Hon. Phillip J. Shefferly

Adv. Proc. No. 05-5149-PJS

[Filed December 1, 2008]

In Re:	)
	)
Jose Antonio Rodriguez,	)
	)
Debtor.	)
	)
Jose Rodriguez,	)
	)
Plaintiff,	)
	)
v.	)
	)
FedEx Freight East, Inc.,	)
	)
Defendant.	)
	)

D. Rick Martin (P42484)
RONALD D. GLOTTA (14061).
Attorneys for Plaintiff
220 Bagley Street, Suite 808
Detroit, MI 48226
(313) 963-1320

William D. Sargent (P38143)
Laura A. Brodeur-McGeorge (P44552)
Matthew S. Disbrow (P65378)
HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Defendant
660 Woodward Avenue, Suite 2290
Detroit, MI 48226
(313) 465-7000

ERRATA SHEET TO AFFIDAVIT OF D. RICK MARTIN

D. RICK MARTIN, being first duly sworn, deposes and says: I, D. RICK MARTIN, hereby am competent to testify on personal knowledge to the following facts and upon being sworn as a witness can competently testify to the facts stated in the Affidavit and shall testify as follows:

1. I was lead counsel for Plaintiff in the trial of Rodriguez vs. FedEx, case no. 08-cv-10637. The trial began on June 23, 2008 and ended on June 27, 2008.

2. After the foreperson, Juror #5, read the verdict in favor of FedEx, I informed the court that I wanted the jurors to be polled.

3. When Juror #2 was asked if that was and is her verdict, she responded "No".

4. The "Parties Proposed Joint Jury Instructions" were prepared by FedEx's counsels, Laura Brodeur and Matthew Disbrow. They were also filed with the court. (Doc/Ent. #35, page 18) Included in the jointly proposed instructions was instruction no. 13, which stated:

Jury Instruction No. 13

Jurors Not to Consider Information Received Outside Presence of Court

The only information that you will receive about this case should come to you in this courtroom. You must not consider any information which may come to you outside this courtroom.

You must not make any investigations on your own or conduct any experiments of any kind. This includes using the Internet for any purpose regarding this case.

If you discover a juror has violated my instructions, you should report it to me. (Ex. 7)

5. I agreed with that instruction, particularly because I knew that the 6th Circuit Court of Appeals' Opinion in this case, Rodriguez v. FedEx, 487 F3d 1001 (6th Cir 2007) was on the Internet. It could be obtained by simply

Googling the name "Laura Brodeur" or "D. Rick Martin and Rodriguez". (Ex. 8).

6. I also knew that if a juror read the Opinion, that juror would have improperly received information outside the presence of the court about the case; including facts that would not be admitted into evidence at trial. Recognizing that a juror's use of the "Internet" could easily prejudice either party's right to a fair and impartial trial, the parties jointly requested that the court explicitly prohibit such use.

7. The court accepted the parties' joint proposed jury instruction no. 13, and specifically told the jurors that they were not use the "Internet" for any purpose regarding the case.

8. On July 15, 2008 the court reporter, Mr. DiBartolomeo was given a check for $1,000.00. As a result, he promised that the ordered transcripts would be provided within 30 days. (Ex. 9) After 30 days had elapsed and the transcripts had not been produced, I began to call him. (Id.). Mr. DiBartolomeo eventually left a voicemail message apologizing for the delay. He stated that he had a personal emergency to attend to. He also stated that he was delayed because his computer had crashed and that he had to use his notes. As a result, the transcripts ordered on July 15, 2008 were not provided until September 10, 2008, some 57 days later.

9. The crash of the computer may explain why the record is replete with misstatements, omissions and grammatical errors.

10. The most crucial and material errors are (1) the false recording of Juror #2's vote in favor of FedEx, and (2) the omission of the court's instruction to the jury not to use the "Internet".

11. The misstatements, omissions and grammatical errors found in the transcript of the Closing Argument, are so numerous that much of the record is completely unintelligible. In addition, during my closing argument, I was interrupted by Juror #5 because of loud comments and laughter by both opposing counsel. The Judge had to instruct them to terminate their disruptive conduct. That interruption and instruction however, is completely missing from the record.

FURTHER AFFIANT SAITH NOT.

/s/ D. Rick Martin
D. Rick Martin

MONICA CHOICE /s/Monica Choice 1/1/08
Notary Public, State of Michigan
County of Wayne
My Commission Expires Aug. 23, 2012
Acting in the County of Wayne

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 08-cv-10637
Hon. George Caram Steeh

Bankruptcy Court Case No. 04-47510-PJS
Chapter 7
Hon. Phillip J. Shefferly

Adv. Proc. No. 05-5149-PJS

[Filed September 19, 2008]

In Re:	)
	)
Jose Antonio Rodriguez,	)
	)
Debtor.	)
	)
Jose Rodriguez,	)
	)
Plaintiff,	)
	)
v.	)
	)
FedEx Freight East, Inc.,	)
	)
Defendant.	)
	)

D. Rick Martin (P42484)
RONALD D. GLOTTA (14061).
Attorneys for Plaintiff
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(313) 465-7000

ERRATA SHEET TO AFFIDAVIT OF D. RICK MARTIN

D. RICK MARTIN, being first duly sworn, deposes and says: I, D. RICK MARTIN, hereby am competent to testify on personal knowledge to the following facts and upon being sworn as a witness can competently testify to the facts stated in the Affidavit and shall testify as follows:

1. I write this affidavit to clarify and answer assumptions raised in the Court's Order denying Plaintiff's motion.

2. Following the polling of the jurors, the court informed the jury that he wanted to meet with them briefly.

3. It is a common practice of lawyers in Michigan to meet, greet, and speak with jurors after the trial has ended.

4. I was on the first floor, in the lobby area for the elevators and less than 10 feet from the court security station entrance and exit station when all eight jurors exited the elevator. They surrounded me and I thanked them for their services. In fact, I expected opposing counsels would also be waiting to thank the jurors for their service and also for giving them a favorable verdict. However, I was not alone; several court security officers were present at their post just a few feet away. There were also other court personnel in the lobby area of the elevators.

5. Attached as Exhibit 5 is a copy of the information contained on the Internet about my background and areas of practice.

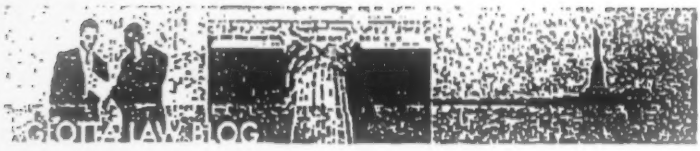
6. If it had come to my attention during trial that Juror #4 went on the Internet and read all about the attorneys as he stated to me, Juror #2 and Juror #5, I would have immediately informed the court and requested an evidentiary hearing and that Juror #4 be disqualified and for a mistrial.

FURTHER AFFIANT SAITH NOT.

/s/ D. Rick Martin
D. Rick Martin

MONICA CHOICE /s/Monica Choice 1/1/08
Notary Public, State of Michigan
County of Wayne
My Commission Expires Aug. 23, 2012
Acting in the County of Wayne

Ex. 5



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* * *

ATTORNEYS

- **Glotta, Ronald D.**
- **Martin, Dewey R**

Attorney D. Rick Martin has devoted his life to fighting for civil rights of minorities and women and the economic rights of workers and retirees.

In 1970, at the age of 18, Martin began working in the Coke Ovens and Blast Furnace plant at the historic and mammoth Ford Rouge Complex in Dearborn, MI. Martin won his first union office at age 20 when he was elected District Committeeman. In 1974, Martin won election to the higher office of plant Bargaining Committeeman. The next year, at age 23, Martin became the youngest Black to ever be elected president of a major UAW plaint in the Union's history. That record still stands 30 years later. Martin went on to win re-election to the presidency in 1978 and 1981. After completing his third consecutive term as

president in 1984, Martin accepted, then UAW Local 600 president, Bob King's offer to join his staff. King is now Vice President of the UAW International Union's Ford department.

In addition to being elected to 3 consecutive 3 year terms as a UAW plant president, Martin was also elected delegate to 4 consecutive UAW Constitutional Conventions. They were held in 1974, 1977, 1980, and 1983. The delegates elect the President of the UAW and determine the UAW policy positions on social and economic issues facing the country.

Although Martin was only 22 years old when he attended his first convention in 1974, Martin stood up and spoke to over 5,000 delegates and guests. Martin passionately urged the delegates to support the union's civil rights resolution for Black Americans. Integration, Martin argued is the key to racial equality and economic justice for all races. At every convention Martin attended, he spoke out for the rights of workers and the retirees who built the union.

In 1979, Martin won the first and only 25 and out retirement plan for Coke Oven workers in the country. The Michigan Chronicle, in March 1976, covered the first of numerous conventions speeches Martin made on behalf of his Coke Oven workers who were subjected to inhumane working conditions. I acknowledge that for any collective struggle, there is no individual claim of credit, nor should there be. For me, however, it is one of the most satisfying part of my history. I continue to receive calls from workers who had to retire early, thanking me for the help.

Martin's historic union achievements were recognized by both the local and national media. For example, The Monthly Detroit Magazine selected Martin as one of the 80 Detroiters To Watch in the 80's. (Among the 80 Detroiters were former mayor Dennis W. Archer and the late UAW International Union President, Steven P. Yobich); the New Yorker Magazine (April 1981; Internationally renowned author and journalist Richard Reeves wrote about Martin as a young Black labor leader in his book American Journey(1981); The Detroit Free Press (October 1981); and Wayne State University South End newspaper (February 1984).

Martin also appeared as a guest on such TV shows as For My People (March 1984 and Detroit Black Journal.

In 1985, Martin became one of only 16 African American's to fill 365 seats at the University of Michigan Law School. Martin realized that, but for the civil rights movement, the doors to this elite school would have remained closed to Blacks and women. Based upon this realization, he became committed to use the legal education to wage legal battles as an attorney, that were designed to not only keep the doors open but to widen the doors of opportunities for minorities and women. With the same commitment for justice Martin has dedicated his law practice to eradicate discriminatory employment practices and to fight for the rights of those who have suffered injuries due to the negligence of others.

In 1992, Martin won the highest jury verdict in a slip and fall case in Michigan. The jury awarded martin's client, a black female who was a single parent of two young children, $5,000.00 for disabling injuries to her back after slipping on ice. In 1998, Martin won $1.25

million for the family of a young women killed while a passenger in a vehicle struck by a city bus.

In 2001, Martin, as reported by the Michigan's Citizen Newspaper, filed the largest race discrimination employment class action in Michigan and probably the nation. According to a joint press release, a Consent Decree was entered in 2005, requiring the defendant Henry Ford Health System to spend $2.1 million in payouts and educational programs for the advancement of its Black employees. The Consent Decree benefited over 3,000 present and former Black workers and generated both local and national media coverage. This included the Michigan Citizen's Newspaper, Detroit News and Free Press, Channel 2, 4 and 7 new stations, CNN news and all of the major Black newspapers in the country.

Areas of Practice

- **employment rights & discrimination**
- **personal injury**
- **criminal defense**

Bar Admissions

- **Michigan, 1989**
- **U.S. Court of Appeals 6th Circuit**
- **U.S. District Court Eastern District of Michigan**

- **Robinson, Sarah**
- **Shearer, Sean**
- **Martin, D. Rick**
  dskutt@ix.netcom.com

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9/18/2008

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HEALTH CARE

For the past 35 years, clients ranging from individual health care practitioners to regional health care systems have relied on us to help them achieve their business objectives while fulfilling their health care delivery mission. Our clients benefit from our extensive knowledge of the health care field and our vast experience with the legal and regulatory context in which health care is delivered. They look to us with confidence in our ability to address the complex and challenging issues confronting them in connection with a full range of regulatory, corporate, transactional, litigation and financial matters. We believe that these qualifications make us the law firm of choice for clients in need of creative, prompt and effective solutions to legal, regulatory, organizational and business challenges.

Our Attorneys

- Zoning, Land Use and Condemnation
- Affordable Housing
- Finance

Our attorneys are distinguished professionals who have many years of experience as practitioners, lecturers and authors in the field of health care law. We have a wide range of experience which we bring to bear in meeting our clients' needs, including experience as in-house counsel for providers and payors. A number of our attorneys have earned advanced degrees in public health and health services administration. As part of a full-service law firm, we also draw upon the skill and experience of our colleagues in a variety of other practice areas to serve the needs of our clients. In this way, our health care clients benefit from the expertise of Honigman's health care attorneys as well as Honigman attorneys practicing in specialties such as antitrust, corporate, construction and real estate, environmental, employee benefits, insurance, intellectual property, litigation, labor, securities, tax and real estate tax appeals, and bankruptcy law.

Our Clients

We serve organizations and individuals across the nation who provide, arrange or pay for health

care services. Our hospital and health system clients include multi-state, multi-hospital systems, academic medical centers, specialty hospitals, long-term care hospitals, and community, critical access and rural hospitals. Our physician clients range from solo practitioners and small group practices to multi-specialty groups and university-affiliated faculty practice plans. We also represent managed care plans, other providers and suppliers, including, independent diagnostic testing facilities (IDTFs), ambulatory surgery centers and imaging centers. Our clients also include home health agencies, assisted living facilities, long-term care facilities, clinical laboratories, durable medical equipment companies, hospices, health maintenance organizations and other payors.

Honigman Health Care Attorneys

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Jennifer L. Benedict
Ann T. Hollenbeck
Matthew R. Keuten
Stuart M. Lockman
Kenneth R. Marcus
Linda S. Ross

Sarah Slosberg Tayler

http://honigmanwe.staged.hubbardone.com/services/xprServiceDetailHon.aspx?xpST=Servi...

7/5/2008

APPENDIX C

Google Searches
(R. 70, Ex. 8, excerpts)

[*Fold-Out Exhibit, see next 2 pages*]

41 - 50 of 491,000 for **laura brodeur** (About) - 0.16 s | SearchScan[BETA] On

[PDF] 2006
180k - Adobe PDF - View as html
Kane, **Laura** & Ron. Kanner, Diane. Kao, Lily. Karen Scott Cosmetics ... **Laura Brodeur**. Robyn M. Browning. The Capital Group Companies, Inc. - Karen. Krygowski ...
www.jlla.org/ama/orig/JLLA-AnRep-07-R5-1-.pdf

Mark Foster - Edmonton, AB | Facebook
Mark Foster (Edmonton, AB) is on Facebook. Facebook gives ... **Laura Brodeur**. Jamie Gillis. Julie Ogilvie Daley. Harlyn Wotton. Aaron Toole. Jason Johnson ...
www.**facebook.com**/people/Mark_Foster/673636677 - Cached

Laura A **Brodeur** - Detroit, Michigan (MI) | Company Information
Laura A **Brodeur** - Detroit, Michigan (MI) company profile information. Find

contact info, company address, company history, qualify leads, & premium business reports
www.**manta.com**/coms2/dnbcompany_lj91h - 66k

2007/12 " Nova Scotia Bikers Information
BRODEUR, Joseph Serge ... Que., he was a son of Richard and Yolande **Brodeur**, Quebec. ... Ellen Marsh; daughter, **Laura Brodeur** (Jeff Hebb), Berwick; sons, ...
novascotiabikers.blog.com/2007/12 - Cached

[PDF] UNITED STATES COURT OF APPEALS
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ARGUED: **Laura** A. **Brodeur**, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Michigan, Carlos ... **Laura** A. **Brodeur**, William D. Sargent, Cameron J. Evans, HONIGMAN, ...
www.**ca6.uscourts.gov**/opinions.pdf/04a0436p-06.pdf

Greatamerican.com - Great American Group Information & Details
Great American Group @ greatamerican.com Information & Details, Profile page of the Great American Group with Information ... of **laura brodeur** as managing ...
1888pressrelease.com/great-american-group-company-profile_14657.html - Cached

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Please select the link below each name to view each new ...
http://www.honigman.com/attorneys/bio.asp?ID=B243892849. **Laura** A. **Brodeur**. Labor, Detroit Office ...

OHLALA Mag: **Ricky Martin**
Alex **Rodriguez**. Alexander Koch. All American Guys. Anaya ... Peter **D** Brown. Photographers. Planet People. Premiere Model Management. Prince Harry & William ...
www.**ohlalamag.com**/en/**ricky_martin** - 97k - Cached

Ricky Martin Celebrity Gossip, News, Rumors and Hollywood Scandals
Madonna and Alex **Rodriguez** Heading To Malawi. Jennifer Aniston Is Not Pregnant ... Kat Von **D**. Kate Beckinsale. Kate Bosworth. Kate Hudson. Kate Middleton. Kate ...
www.**hollywoodbackwash.com**/category/**ricky-martin** - 161k - Cached

[PDF] UNITED STATES COURT OF APPEALS
49k - Adobe PDF - View as html
ON BRIEF: **D. Rick Martin,** Detroit, Michigan, for Appellant. ... In February 2001, FedEx acquired American, and both **Rodriguez and** Adkinson ...
www.**ca6.uscourts.gov**/opinions.pdf/07a0246p-06.pdf

Collection of Articles - **Ricky** Rodruguez

... Borowik, a spokeswoman for the Family International's office in Washington, D.C. ... **Martin** watched the tape in horror to see the usually well-mannered **Rodriguez** ...
www.exfamily.org/art/ext/ricky_rodriguez_news_articles.shtml - 54k - Cached

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